RECORD AND BRIEFS

No. 15-1248

Supreme Court, U.S.
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In The
Supreme Court of the United States

MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX VOLUME I

ALLYSON N. HO
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
T. 214.466.4000
allyson.ho@morganlewis.com
Counsel for Petitioner

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
DEPARTMENT OF JUSTICE
Washington, D.C. 20530
T. 202.514.2217
SupremeCtBriefs@usdoj.gov
Counsel for Respondent

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Relevant Docket Entries for the United States District Court District of Arizona (Phoenix Division) CIVIL DOCKET FOR CASE #: 2:12-cv-02469-GMS

Date Filed	#	Docket Text
08/14/2012	1	Miscellaneous Case Opening Regarding: Application for an Order to Show Cause Why an Administrative Subpoena Should not be Enforced, filed by Equal Employment Opportunity Commission (submitted by Meenoo Chahbazi). (Attachments: #1 Text of Proposed Order, # Civil Cover Sheet)(REK) (Entered: 08/14/2012)
08/14/2012	2	MEMORANDUM in Support of 1 Application For an Order to Show Cause Why an Administrative Subpoena Should not be Enforced by Petitioner Equal Employment Opportunity Commission (submitted by Meenoo Chahbazi). (Attachments: # 1 Exhibit, # 2 Exhibit)(REK) (Entered: 08/14/2012)
08/22/2012	4	ORDER granting 1 Motion for Order to Show Cause, Show Cause Hearing set for 10/17/2012 at 04:00 PM in Courtroom 603, 401 West Washington Street, Phoenix, AZ 85003 before Judge David G Campbell. Show Cause Response due by 9/26/2012. Signed by Judge David G

		Campbell on 8/22/2012.(NVO) (Entered: 08/22/2012)
09/26/2012	9	RESPONSE to Motion re 1 MOTION for Order to Show Cause filed by McLane Company Incorporated. (Attachments: # 1 Exhibit A Part 1, # 2 Exhibit A Part 2, #3 Exhibit B Part 1, #4 Exhibit B Part 2, # 5 Exhibit B Part 3, #6 Exhibit B Part 4, #7 Exhibit B Part 5, # 8 Exhibit C, #9 Exhibit D, # 10 Exhibit E, # 11 Exhibit F)(Kasarjian, Ashley) (Entered: 09/26/2012)
10/23/2012	15	*REPLY *to McLane's Response to Order to Show Cause* by Petitioner Equal Employment Opportunity Commission. (Attachments: # 1 Exhibit 5, # 2 Exhibit 6, # 3 Exhibit A, # 4 Exhibit B)(Chahbazi, Meenoo) *Modified on 10/26/2012 to Seal Exhibit B Pursuant to Order 18 (MAP)*. (Entered: 10/23/2012)
11/16/2012	26	Minute Entry in MC-12-00081-PHX-GMS and CV-12-02469-PHX-GMS for proceedings held before Judge G Murray Snow: Show Cause Hearing held on 11/16/2012. Order to follow. The parties are directed to file all future pleadings with the new civil case number CV-12-02469-PHX-GMS.

		APPEARANCES: Mary O'Neill and Sean Ratiff for Petitioner. Ashley Kasarjian, Joshua Woodard, and Ellen Perlioni for Respondent. (Court Reporter Gary Moll.) This is a TEXT ENTRY ONLY There is no PDF document associated with this entry. (KFZ) (Entered: 11/16/2012)
11/19/2012	27	ORDER granting 12 Motion to Seal. The Clerk of Court is directed to file under seal the lodged proposed exhibits (Doc. 13). FURTHER ORDERED Denying as moot McLane's 22 Motion to Strike Exhibits. FURTHER ORDERED. Regarding those people who applied to McLane and took the IPCS PCE, McLane must provide the E.E.O.C. one of the following: SEE ORDER FOR DETAILS. FURTHER ORDERED The Clerk of Court is directed to terminate this action. Signed by Judge G Murray Snow on 11/19/12.(MAP) (Entered: 11/19/2012)
11/19/2012	28	Sealed Exhibits re 15 filed by Equal Employment Opportunity Commission. (Attachments: #1 Exhibit, # 2 Exhibit, # 3 Exhibit)(MAP) (Entered: 11/19/2012)

01/17/2013	32	NOTICE. OF APPEAL to 9th Circuit, as to 27 Order by Equal Employment Opportunity Commission. (Ratliff, Sean) (Entered: 01/17/2013)

Relevant Docket Entries for the United States Court of Appeals for the Ninth Circuit (CIVIL DOCKET FOR CASE #: 13-15126)

Date Filed	#	Docket Text
06/03/2013	12	Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellant EEOC. Date of service: 06/0312013. [8652178]—[COURT UPDATE: Attached compatible version of PDF for volume 2 of excerpts. 02/05/2015 by RY] (Tucker, James) [Entered: 06/03/2013 12:23 PM]
08/02/2013	18	Submitted (ECF) Answering Brief for review. Submitted by Appellee McLane Company, Inc.. Date of service: 08/02/2013. [8728430] (Perlioni, Ellen) [Entered: 08/02/2013 12:53 PM]
08/02/2013	19	Submitted (ECF) supplemental excerpts of record. Submitted by Appellee McLane Company, Inc. Date of service: 08/02/2013. [8728450] (Perlioni, Ellen) [Entered: 08/02/2013 01:06 PM]
08/02/2013	20	Filed (ECF) Appellee McLane Company, Inc. Motion to take judicial notice of. Date of service: 08/02/2013. [8728475] (Perlioni, Ellen) [Entered: 08/02/2013 01:21 PM]

09/16/2013	26	Submitted (ECF) Reply Brief and supplemental excerpts of record for review. Submitted by Appellant E.E.O.C. Date of service: 09/16/2013. [8782970] (Tucker, James) [Entered: 09/16/2013 09:54 AM]
10/27/2015	36	Filed order (J. CLIFFORD WALLACE, MILAN D. SMITH, JR. and PAUL J. WATFORD) Appellee's request that we take judicial notice of the order in EEOC v. McLane Co., 2012 WL 1132758 (D. Ariz. Apr. 4, 2012), is GRANTED. [9733528] (RMM) [Entered: 10/27/2015 08:16 AM]
10/27/2015	37	FILED OPINION (J. CLIFFORD WALLACE, MILAN D. SMITH, JR. AND PAUL J. WATFORD) REVERSED in part, VACATED in part, and REMANDED. Judge: MDS Concurring, Judge: PJW Authoring. FILED AND ENTERED JUDGMENT [9733533] (RMM) [Entered: 10/27/2015 08:27 AM]
12/11/2015	43	Filed (ECF) Appellee McLane Company, Inc. petition for rehearing en banc (from 10/27/2015 opinion). Date of service: 12/11/2015. [9790237] [13-15126] (Perlioni Ellen) [Entered: 12/11/2015 06:31 PM]
12/18/2015	44	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Chamber of Commerce of the

		United State [sic] of America. Date of service: 12/18/2015. [9799048] [13-15126]—[COURT UPDATE: Attached certificate of service to end of brief. 12/21/2015 by RY] (Lapp, Richard) [Entered: 12/18/2015 02:54 PM]
01/22/2016	48	Filed order (J. CLIFFORD WALLACE, MILAN D. SMITH, JR. and PAUL J. WATFORD): Judge Smith and Judge Watford vote to deny the petition for rehearing en banc, and Judge Wallace so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc, filed December 11, 2015, is DENIED. [9836570] (AF) [Entered: 01/22/2016 09:27 AM]

[Doc. 1]

Mary Jo O'Neill, AZ Bar No. 005924
Andrea G. Baran, MO Bar No. 46520
Meenoo Chahbazi, DC Bar No. 494651
Equal Employment Opportunity Commission
3300 N. Central Ave., Suite 690
Phoenix, AZ 85012
Telephone: 602-640-5061
Email: mary.oneill@eeoc.gov
andrea.baran@eeoc.gov
meenoo.chahbazi@eeoc.gov

Attorneys for Petitioner

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc. Respondent.	**Case No.** **APPLICATION FOR AN ORDER TO SHOW CAUSE WHY AN ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED** (Filed Aug. 14, 2012)

1. This is an action for enforcement of a subpoena issued pursuant to Section 710 of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-9, and Section 107(a) of the Americans

with Disabilities Act of 1990 as amended (ADA), 42 U.S.C. § 12117(a).[1]

2. Jurisdiction is conferred upon the court by Section 107(a) of the ADA, 42 U.S.C. § 12117(a), which incorporates Sections 706(f)(3) and 710 of Title VII, 42 U.S.C. §§ 2000e-5(f)(3) and 2000e-9, the latter of which incorporates Section 11 of the National Labor Relations Act, 29 U.S.C. § 161.

3. Petitioner, the Equal Employment Opportunity Commission ("EEOC" or "Commission"), is the federal agency charged with the administration, interpretation and enforcement of the ADA and Title VII, including the investigation of charges of unlawful employment practices, and is authorized to bring this action pursuant to Section 107(a) of the ADA, 42 U.S.C. § 12117(a) and Section 710 of Title VII, 42 U.S.C. § 2000e-9.

4. The Respondent, McLane Company, Inc. is an employer doing business in the State of Arizona with a facility in Goodyear, Arizona.

5. On February 15, 2011, pursuant to its authority under 29 U.S.C. § 161[2], the EEOC issued to the Respondent Subpoena No. PHX-11-32, which was duly served on the Respondent.

6. Subpoena PHX-11-32 required the Respondent to produce information needed as part of the EEOC's

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[1] 42 U.S.C. § 12117(a) incorporates Section 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-9.

[2] 29 U.S.C. § 161 is incorporated in Section 710 of Title VII, 42 U.S.C. § 2000e-9, which, in turn, is incorporated in Section 107(a) of the ADA, 42 U.S.C. § 12117(a).

investigation into whether the Respondent has engaged in employment practices made unlawful by the ADA and Title VII.

7. The Respondent filed a Petition to Revoke or Modify the subpoena on February 22, 2011. On March 21, 2012, the Commission issued a determination denying Respondents Petition to Revoke or Modify, and requiring the requested information to be submitted to the EEOC within 20 days.

8. The Respondent has provided some information but has refused to comply fully with Subpoena No. PHX-11-32 and has not provided the essential information requested.

9. Respondent's failure to comply fully with the Subpoena has delayed and hampered the EEOC's investigation.

10. The accompanying Memorandum and Declaration of Elizabeth Cadle, Deputy Director, filed concurrently herewith, and the additional exhibits to the application, provide the factual and legal support for this application. The Memorandum, Declaration, and the attachments are incorporated by reference into this application.

WHEREFORE, the Equal Employment Opportunity Commission prays:

a) That the Court issue an Order directing the Respondent to appear before this Court and to show cause, if there be any, why an order should not issue directing the Respondent to comply with the Subpoena;

b) That, upon return of the Order to Show Cause, an order issue directing the Respondent to comply with the Subpoena, and;

c) That the Equal Employment Opportunity Commission be granted its costs and such further relief as may be necessary and appropriate.

RESPECTFULLY SUBMITTED this 14th day of August, 2012.

MARY JO O'NEILL
Regional Attorney

ANDREA G. BARAN
Supervisory Trial Attorney

/s/ Meenoo Chahbazi
MEENOO CHAHBAZI
Trial Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Phoenix District Office
3300 North Central Avenue,
Suite 690
Phoenix, Arizona 85012

Attorneys for Plaintiff

[Certificate Of Service Omitted]

[Doc. 2]

Mary Jo O'Neill, AZ Bar No. 005924
Andrea G. Baran, MO Bar No. 46520
Meenoo Chahbazi, DC Bar No. 494651
Equal Employment Opportunity Commission
3300 N. Central Ave., Suite 690
Phoenix, AZ 85012
Telephone: 602-640-5061
Email: mary.oneill@eeoc.gov
andrea.baran@eeoc.gov
meenoo.chahbazi@eeoc.gov

Attorneys for Petitioner

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc. Respondent.	Case No. **MEMORANDUM IN SUPPORT OF APPLICATION FOR AN ORDER TO SHOW CAUSE WHY AN ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED** (Filed Aug. 14, 2012)

This case is before the Court on the application of the Equal Employment Opportunity Commission (the "EEOC" or "Commission") for an Order to Show Cause Why an Administrative Subpoena Should not be Enforced. The EEOC is currently investigating charges of

sex and disability discrimination filed against McLane Sunwest, a division of McLane Company, Inc., ("Respondent") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") and the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§12101 *et seq.* ("ADA"). In the course of its investigation, the EEOC issued administrative Subpoena No. PHX-11-32 seeking documents relating to the investigation. The Respondent to date has produced some data and documents but has failed to produce other pertinent information and that failure has delayed and hampered the investigation of the charges. The EEOC therefore applies to this Court to issue an Order to Show Cause Why the Subpoena Should not be Enforced.

FACTUAL BACKGROUND

On January 7, 2008, Damiana Ochoa ("Charging Party") filed a charge (Charge No. 540-2008-01093 or "Ochoa Charge") with the EEOC alleging Respondent violated Title VII and the ADA by discriminating against her on the basis of sex and disability. (Exhibit A, Declaration of Elizabeth Cadle, Deputy District Director ("Cadle Decl.") ¶ 5 & Attachment 1 thereto). Charging Party asserted that Respondent violated Title VII and the ADA by requiring her to pass a physical capability exam "PCE," which is also referred to as the "Industrial Physical Capability Strength Test," "IPCS," or "IPCS PCE," upon her return from maternity leave. Charging Party, who had been employed by Respondent for eight years, was terminated from employment

when she did not pass the test. Charging Party further alleged that Respondent violated the ADA by requiring every employee returning to work from medical leave, and all new hires, to take, and pass the IPCS test before employment could commence.

The EEOC commenced investigation of Charge No. 540-2008-01093. During the course of its investigation, the EEOC discovered that Respondent made use of the IPCS test in its Grocery and Food Services divisions, nation-wide. Because the EEOC had reason to believe that the IPCS test may also result in discrimination on the basis of age, on August 6, 2010, the EEOC notified Respondent that the Director of the Phoenix District Office, Rayford 0. Irvin, had directed that a nation-wide investigation commence regarding Respondent's compliance with the Age Discrimination in Employment Act of 1967 ("ADEA"). (Ex. A, Cadle Decl. ¶ 13, and Attachment 9, thereto). On this same date, the EEOC provided Respondent with a consolidated Request for Information seeking information and documents for both the ADEA Directed Charge and the Ochoa Charge. *Id.*

On September 6, 2010, the EEOC received a second charge of discrimination against Respondent alleging discrimination based on disability. This charge was filed with both the EEOC and the California Department of Fair Employment and Housing. The Charging Party, employed eleven years by Respondent, alleged that he was discriminated on the basis of his disability when Respondent required him to take an

isokinetic test (IPCS test) upon his return from medical leave. Charging Party was terminated thereafter because he did not pass the test.

In November 2010, the EEOC notified Respondent that it was separating its consolidated Request for Information and issuing a separate Request for Information under the ADEA than under Title VII/ADA. The Commission further notified Respondent that it was conducting a nation-wide investigation of the Ochoa charge. (Ex. A, Cadle Decl. ¶ 15, and Attachment 10, thereto). Subsequently, on February 15, 2011, the EEOC issued administrative Subpoena No. PHX-11-32 in the Ochoa Charge. Respondent in turn, filed a Petition to Revoke or Modify Subpoena PHX-11-32.

In the Petition to Revoke subpoena PHX-11-32, Respondent specifically objected to the subpoena on the grounds that it was almost identical to the subpoena that was issued in the EEOC's ADEA Directed Charge. In addition, Respondent objected to the subpoena request for employee lists with names, last known addresses, phone numbers, and social security numbers because it would require Respondent to compile data, and the request was irrelevant, overbroad, unduly burdensome, confidential, an abuse of process, and issued solely to harass Respondent.

On August 9, 2011, the EEOC received another charge of discrimination against Respondent. The Charging Party alleged that Respondent discriminated against her on the basis of sex, disability, and age by terminating her employment when she was

unable to pass a physical strength test administered upon the end of her medical leave.

On August 24, 2011 the EEOC and Respondent met and conferred in an attempt to resolve disputes regarding some of the information sought in the subpoena. (Ex. A, Cadle Decl. ¶ 22, and Attachment 12, thereto). The category of essential information that both the EEOC and Respondent were not able to reach agreement on and which to this date have still not been produced to the EEOC fall into two categories. The first category encompasses lists of employees and applicants who have been terminated, demoted, or not hired because they failed the IPCS test, including their names, last known addresses, phone numbers and social security numbers (Request Nos. 10, 11a, 14, 15). The second category concerns data of employees and applicants who took the test, including:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

g. date of hire (or promotion), and job classification at hire (or promotion)

> h. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)
>
> i. position held at the time test was administered (for individuals employed at the time or returning to work)
>
> j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)
>
> k. reason why test was administered to each person tested
>
> l. date and reason for termination (if applicable)

(Request Nos. 8a-1). On March 21, 2012, the EEOC issued its final determination denying Respondent's Petition to Revoke or Modify Subpoena No. PHX-11-32, and directing Respondent to provide the requested information within twenty days. (Ex. A, Cadle Decl. ¶ 23, and Attachment 14, thereto). Although Respondent has produced some information to the EEOC, such as data regarding gender and test scores of employees and applicants in the grocery division, it has not provided essential information, such as the names, identities, and contact information of the employees and applicants who were required to take the test. More specifically, to date, Respondent has not provided lists of employees and applicants who have been terminated, demoted, or not hired because they failed the

IPCS test and has not provided the name, social security number, last known address, phone number, medical condition, information regarding position held, date and reason for termination of individuals who took the IPCS test. Additionally, in a letter dated May 10, 2012, Respondent advised the EEOC that the data it had produced contained errors relating to "de-duplication" of duplicate entries for test-takers who took the IPCS PCE multiple times and that these errors may "impact [the EEOC's] analysis as well." ((Ex. A, Cadle Decl. ¶ 24, and Attachment 15, thereto).

LEGAL ARGUMENT

EEOC subpoena enforcement proceedings are summary in nature and involve only limited judicial review. *EEOC v. Fed. Ex. Corp.*, 558 F.3d 842, 848 (9th Cir. 2009) *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001). To successfully petition a court to enforce an administrative subpoena, the Commission needs only to show that 1) the subpoena is within the agency's authority; 2) whether procedural requirements have been followed; and 3) the information sought is relevant to the investigation. *Id.*; *see also Univ. of Pa v. EEOC*, 493 U.S. 182, 191 (1990); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 72 n.26 (1984); *Karuk Tribe*, 260 F.3d at 1076. As the following discussion illustrates, the Commission has satisfied all of these requirements, therefore, the subpoena should be enforced.

1. The subpoena is valid and within the agency's authority.

Subpoena PHX-11-32 is valid and within the EEOC's authority to issue. Congress has authorized, and indeed mandated, that the EEOC investigate charges of discrimination alleging violations of the ADA and Title VII. 42 U.S.C. §12117(a) (incorporating 42 U.S.C. § 2000e-5(b)). Congress has imposed broad powers of access to records of those entities against whom charges have been filed, 42 U.S.C. § 2000e-8(a) (incorporated by 42 U.S.C. § 12117(a)), including the authority to subpoena evidence in an investigation, 29 U.S.C. §161 (incorporated into Title VII by 42 U.S.C. § 2000e-9 which in turn is incorporated into the ADA by 42 U.S.C. § 12117(a)). The EEOC is investigating the Charging Party's allegations that Respondent engaged in sex and disability discrimination in violation of Title VII and the ADA. Such an investigation is within the agency's authority. Thus, the first prong of the test has been satisfied.

2. EEOC has fulfilled all of its own procedural prerequisites in issuing the subpoena.

A valid charge has been filed and the subpoena contains all the information required by the EEOC's regulations. See 29 C.F.R. § 1601.16(a) (elements of subpoena)[1]. See also *EEOC v. Shell Oil Co.*, 466 U.S. 54,

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[1] 29 C.F.R § 1601.16(a) states, in relevant part:

The subpoena shall state the name and address of its issuer, identify the person or evidence subpoenaed, the

67-74 (1984) (addressing requirements of valid charge); 29 C.F.R. § 1601.12 (same). The Respondent does not and could not allege that these basic requirements have not been met.

3. EEOC has satisfied the broad relevancy requirements in an administrative subpoena.

The information sought by subpoena PHX-11-32 is relevant to the issues of sex and disability discrimination under investigation. The concept of relevancy during an EEOC investigation is broader than it is during litigation. Section 709(a) broadly grants the EEOC access to "any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a) (incorporated by 42 U.S.C. § 12117(a)). "[C]ourts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984). The Ninth Circuit has ruled that the scope of information considered relevant under this standard is "quite broad." *EEOC v. Recruit U.S.A. Inc.*, 939 F.2d 746, 756 (9th Cir. 1991). In

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person to whom and the place, date, and the time at which it is returnable or the nature of the evidence to be examined or copied, and the date and time when access is requested. A subpoena shall be returnable to a duly authorized investigator or other representative of the Commission.

addition, the commission does not need to present a "specific reason for disclosure" of the requested information, *Univ. of Pa. v. EEOC*, 493 U.S. 182, 194 (1990), and courts will defer to the agency's appraisal of relevance so long as it is not "'obviously wrong.'" *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 113 (4th Cir. 1997) (quoting *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992). The information sought by the EEOC without a doubt "might cast light on the allegations against the employer." *Shell Oil Co.*, 466 U.S. at 68-69.

A. Contact Information Is Necessary to Identify Disabled Employees and Applicants Who Took the IPCS Test.

To investigate whether the IPCS test violates the ADA, the EEOC needs to contact applicants and employees to identify individuals with disabilities and conduct data analysis regarding the test performance of those individuals. Thus far, Respondent has failed to provide information regarding the medical conditions or disabilities of applicants and employees who took the IPCS test. Additionally, because information regarding the disabilities of some individuals may not be readily apparent to Respondent, the EEOC needs to contact test takers to obtain specific information. Ms. Ochoa alleged in her Charge of Discrimination that the IPCS test is given to all employees returning to work from medical leave as well as new hires and violates the ADA. At least two other McLane employees have also filed Charges of Discrimination under the ADA

alleging that they were discriminated against on the basis of disability when they were required to take the IPCS test following their return from medical leave. Identifying and contact information for test-takers is highly relevant and essential to the Commission's ability to investigate whether Respondent's use of the IPCS test violates the ADA.

B. Identifying and Contact Information Is Necessary to Properly Investigate the Claims of Putative Class Members.

Contact and identifying information is also necessary to identify the putative class of women and disabled individuals who were subjected to adverse employment action because of their test scores. Additionally, the EEOC needs contact information for these women and disabled individuals to obtain specific information about the adverse actions taken against them and determine each individual's potential damages. With respect to disabled individuals, the Commission also needs to talk to these individuals to find out whether and what kind of accommodations were provided under the ADA if they failed to pass the test following a medical leave or during the application process.

C. Recent Case Law Subjects EEOC To A Possible Claim That It Failed To Exhaust Administrative Prerequisites If It Does Not Identify Putative Class Members During Its Investigation.

Recent case law supports an argument that EEOC is obliged to identify and investigate the claims of all potential class members prior to filing a lawsuit. *See E.E.O.C. v. CRST Van Expedited, Inc.*, 2012 WL 1583026, *10, Nos. 09-3764, 09-3765, 10-1682 (8th Cir. Feb. 12, 2012); *State ex rel. Terry Goddard, Attorney General v. Geo Group, Inc.*, Civil Action No. CV 10-1995-PHX-SRB, *18-19 (D. Ariz. Apr. 12, 2012) (unpublished) (attached hereto as Exhibit B). Given such holdings, the EEOC must obtain contact information for individuals who may have been subject to systemic discrimination during an early phase of its investigation. Otherwise, if the EEOC were to later find reasonable cause to believe that discrimination occurred, it might not be able to seek relief on behalf of individuals it was unable to identify. Although not binding on this Court, such case law suggests that identifying information and the ability to interview putative class members, if not essential, is at least relevant to any EEOC investigation involving potential systemic or class-based claims.

D. Social Security Numbers Are Unique Identifiers, Which Are Necessary To More Accurately Analyze Data and Link Data Across Databases.

Social security numbers of test-takers are also relevant, *inter alia*, because they are unique identifiers which are necessary to more accurately analyze and link data. When conducting data analysis, it is important to use unique identifiers to analyze and link data. A unique identifier such as a social security number is a value that allows a given individual to be identified within a given database and clearly distinguished from other individuals within that database. This value also allows data for a given individual to be linked across databases. IPCS, the company that administers the IPCS PCE test to McLane applicants and employees, uses social security numbers to identify and distinguish test-takers in its databases. McLane itself also uses social security numbers to identify and differentiate between employees in its databases. However, McLane has removed social security numbers (as well as names and other identifying information) from the data it has produced to the EEOC. Although the data produced by McLane includes "employee identification numbers," these numbers were recently created by McLane to respond to the EEOC's subpoena and the EEOC cannot confirm whether they are truly unique. The utilization of social security numbers as a unique identifier allows for accurate identification of individuals who have taken the IPCS

PCE on more than one occasion reliably in [sic] way that an employee identification number may not.[2]

In fact, in recent correspondence, McLane has admitted that the data it has produced to the EEOC is subject to errors relating to "de-duplication." (Ex. A, Cadle Decl. ¶ 24, and Attachment 15, thereto.) With a truly unique identifier such as a social security number, a test taker's different attempts to take the IPCS test can easily be determined. Unlike social security numbers, which are known to be unique, the employee identification numbers assigned by Respondent's Counsel are prone to errors. As such, the Commission requests social security numbers be provided in order to ensure that individuals within the multiple data sources can be uniquely identified and their data linked across multiple sources.

4. The Subpoena Is Not Unduly Burdensome.

Respondent objects to the subpoena because it will require data compilation that is unduly burdensome, overbroad and irrelevant. First, Respondent argues that the EEOC subpoena will require Respondent to create, produce and compile information, electronic or otherwise, causing it a significant monetary expense, and that this is unduly burdensome. The Commission,

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[2] Extant academic literature concerning the statistical analysis of adverse impact indicates that the issue of repeat applicants should be taken into consideration when conducting such analyses. Eric M. Dunleavy et al., *On the consequences of frequent applicants in adverse impact analyses: A demonstration study*, INT'L J. OF SELECTION & ASSESSMENT, 16(4), 333-344 (2008).

however, has the right to subpoena "[t]he production of evidence, including but not limited to, books, records, correspondence, or documents." 1 *EEOC Compliance Manual* § 24.4(a) (5/92); *see also* 29 C.F.R. § 1601.16(a)(2). In addition, courts have consistently required respondents to compile information and have held that the "EEOC may compel an employer to compile information within its control in order to respond to a subpoena, and the subpoena power of the EEOC is not limited to production of documents already in existence." *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1039 (10th Cir. 1993); *EEOC v. Md. Cup Corp.*, 785 F.2d 471, 478 (4th Cir. 1986); *see also Shell Oil Co.*, 466 U.S., at 68-69.

Moreover, the Ninth Circuit has required an employer to respond to requests requiring compilation of information. *EEOC v. Fed. Ex. Corp.*, 558 F.3d 842, 854-56 (9th Cir. 2009) (FedEx required to respond to subpoena and identify computerized databases in which it maintains employee information), adopting the analysis in *EEOC v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 114 (4th Cir. 1997). In addition, a court will not excuse compliance with a subpoena on the grounds of burdensomeness unless the respondent establishes that compliance seriously threatens to disrupt or hinder the normal operation of a business. *EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642, 648 (7th Cir. 1995). "There is a presumption in favor of requiring an employer's compliance with a subpoena when the Commission inquires into legitimate matters of public interest." *EEOC v. Konica Minolta Bus. Solutions U.S.A.*

Inc., 639 F.3d 366, 371 (7th Cir. 2011). And conclusory allegations that it would be burdensome to respond to the subpoena are not sufficient to meet the Respondent's burden. *Id.*

Respondent has not shown how the compilation of information such as the contact and identifying information for putative class members will add a burdensome cost to its normal operating costs. In *Maryland Cup*, the court found that it was not unduly burdensome for the Respondent to have to pay $75,000 to compile the requested information because employer did not show that this cost was burdensome in light of normal operating costs or that the gathering of information would threaten operations. 785 F.2d at 479. Here, Respondent states that the compilation and production of the information requested would impose a "significant monetary expense" on it, but it does not provide a specific estimate of the cost nor does it compare this cost to its normal operating expenses. Moreover, it was more burdensome for McLane to withhold social security numbers, names, and other identifying information from the IPCS data, than to produce that information.

5. The Commission Has Investigative Authority to Consolidate and Coordinate Its Investigation of Different Charges.

Respondent objects that subpoena PHX-11-32 issued in this charge is identical to the subpoena issued in the ADEA Directed Charge. However, consolidation

and coordination of investigations is within the authority of the Commission, and in fact the Compliance Manual explicitly recognizes that it might be necessary. The Compliance Manual specifically states:

> (e) Consolidation or Coordination of Charges—In deciding whether to consolidate or co-ordinate the investigation of two or more charges, consider whether personal harm and the immediate work environment are similar, whether there is otherwise a *common thread* to the allegations, or whether other factors exist which make consolidation or coordination practical.

1 *EEOC Compliance Manual*, § 2.7(e) (5/92) (emphasis added). The issue is not whether overlapping information is requested, but whether the information sought in this charge is within the EEOC's investigative authority and is "relevant to the charge under investigation." Section 709(a), 42 U.S.C. § 2000e-8(a).

Here, the Commission initially coordinated the investigation of this charge and the ADEA Directed Charge by issuing one Request for Information seeking information for both charges. Because both the underlying charge here and the ADEA Directed Charge related to Respondent's use of the IPSC [sic] test, and the test is administrated nationwide, there was a common thread to both charges. The Commission, thereafter, reconsidered its decision and separated the requests. Although the Requests for Information are separated, the Commission has the discretion to seek similar information in both charges as it continues its

investigation because both charges relate to Respondent's use of the same IPCS test.

Additionally, the information sought in the two subpoenas is not identical, and cannot be identical because the information relates to different protected categories. The subpoenas, however, do seek similar information because both charges deal with the discriminatory nature of Respondents testing policies and practices. The Ochoa Charge specifically alleges that Respondent's testing practices are discriminatory based on sex and disability, and so information regarding the implementation of testing policies falls squarely within the EEOC's authority to investigate the charge.

6. The EEOC Is Bound By Law To Maintain The Confidentiality Of Material Produced In Investigation.

Respondent objects to the production of documents and information due to confidentiality concerns. However, Courts have held that "confidentiality is no excuse for noncompliance" with an EEOC subpoena because of the criminal penalties imposed on EEOC personnel who publicize information obtained in the course of investigating charges of employment discrimination. *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 312 (7th Cir. 1981) (citing 42 U.S.C. § 2000e-5(b), 42 U.S.C. § 2000e-8(e) (incorporated by 42 U.S.C. § 12117(a)), *see also EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 604 (1981) (Respondent does not have categorical

right to refuse to comply with the EEOC subpoena based on concerns that the information supplied would not be held in absolute secrecy).

The plain statutory language of the Title VII requires the EEOC not to disclose any information obtained in the investigation phase. 42 U.S.C. § 2000e-8(e) (incorporated by 42 U.S.C. § 12117(a)). "Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year." *Id.* Therefore, during the investigation stage, the Commission is bound by law to protect the privacy rights of Respondent and its employees in the information produced. Failure to do so subjects the EEOC employees to fines and possible imprisonment. In order to comply with this law, the EEOC regularly insures the confidentiality of the information by redacting social security numbers, dates of birth, and other confidential or privileged information when responding to Freedom of Information Act requests. Thus, confidentiality is not a valid basis for a party to refuse to comply with an EEOC subpoena.

7. Respondent's Characterization Of The Subpoena As An Abuse Of Process Is Unfounded.

Respondent asserts in its petition that the EEOC subpoena is an abuse of process. However, it has not provided evidence to meet the high burden of show

that the EEOC abused its discretion in issuing this administrative subpoena. The Ninth Circuit has ruled that the scope of information that the EEOC can obtain through an administrative subpoena is "quite broad." *EEOC v. Recruit U.S.A. Inc.*, 939 F.2d 746, 756 (9th Cir. 1991). In *EEOC v. Recruit*, the Ninth Circuit stated "We therefore decline the companies' invitation to straitjacket the EEOC into an artificially narrow survey of Recruit's and Interplace's employment records. "'Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation.'" 939 F.2d at 756-757 (9th Cir. 1991) (citations omitted). The Tenth Circuit has also clarified:

> Although the Supreme Court has advised that the relevance standard must not be interpreted so broadly as to render the statutory language a "nullity," we have explained (1) that an EEOC administrative subpoena :is enforceable even though no 'probable cause' has been shown," (2) that even some request we "previously considered to be administrative *'fishing expeditions'* are often permitted," and (3) that such subpoenas "may be enforced for investigative purposes unless they are plainly incompetent or irrelevant to any lawful purpose."

EEOC v. Dillon Companies, 310 F.3d 1271, 1274-75 (10th Cir. 2001) (citations omitted) (emphasis added). As discussed above, the information sought by the EEOC is relevant to its investigation of the Respondent's administration of a nation-wide test that may be discriminatory.

Finally, Respondent alleges that the EEOC subpoena is issued solely to harass the Respondent but does not provide evidence for this allegation. Charging Party here, and at least two others, who have been employed with Respondent for a number of years have been terminated by Respondent after failing to pass a physical strength test administered after medical leave. The charges challenge a nation-wide testing policy that prohibits employees from returning from maternity and/or medical leave to commence work until they pass a strength test. This same policy affects new applicants who are interested in employment with Respondent, including individuals who may be disabled, from acquiring employment with Respondent. The result of these practices by Respondent affects the public interest. Therefore the EEOC's investigation is both warranted and justified.

CONCLUSION

For the foregoing reasons, the Court should enforce the EEOC's subpoena PHX-11-32. The subpoena seeks information relevant to a valid charge of discrimination that is within the EEOC's investigatory authority. The Commission therefore urges the Court to issue the accompanying proposed Order to Show Cause, and, after giving the Respondent an opportunity to be heard, enforce the subpoena.

RESPECTFULLY SUBMITTED this 14th day of August, 2012.

MARY JO O'NEILL
Regional Attorney

ANDREA G. BARAN
Supervisory Trial Attorney

/s/ Meenoo Chahbazi
MEENO CHAHBAZI
Trial Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Phoenix District Office
3300 North Central Avenue,
Suite 690
Phoenix, Arizona 85012

Attorneys for Plaintiff

[Certificate Of Service Omitted]

[Doc. 2-1]

EXHIBIT A

Mary Jo O'Neill, AZ Bar No. 005924
Andrea G. Baran, MO Bar No. 46520
Meenoo Chahbazi, DC Bar No. 494651
Equal Employment Opportunity Commission
3300 N. Central Ave., Suite 690
Phoenix, AZ 85012
Telephone: 602-640-5061
Email: mary.oneil@eeoc.gov
andrea.baran@eeoc.gov
meeno.chahbazi@eeoc.gov

Attorneys for Petitioner

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc. Respondent.	)	Case No. **DECLARATION OF ELIZABETH CADLE IN SUPPORT OF APPLICATION FOR ORDER TO SHOW CAUSE WHY AN ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, Elizabeth Cadle, solemnly state as follows:

1. I am the Deputy District Director of the Phoenix District Office of the Equal Employment Opportunity Commission ("EEOC"), and, in that role, I am responsible for the investigation of charges of employment discrimination.

2. The Phoenix District Office is responsible for investigating charges that employers have engaged in employment practices made unlawful by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the Americans with Disabilities Act of 1990 as amended, 42 U.S.C. §§ 12101 *et seq.* (ADA).

3. Among the EEOC'S investigative files in the Phoenix District Office is the charge file for Charge No. 540-2008-01093, filed against McLane Sunwest by Charging Party Damiana Ochoa. McLane Sunwest is a facility operated by McLane Company Inc., ("Respondent").

4. I state the following based on my personal examination of the files for Charge No. 540-2008-01093 as well as other ADA and Title VII charges of discrimination filed against Respondent and an ADEA Directed Investigation of Respondent.

5. On January 7, 2008, the EEOC's Phoenix District Office received Charge 5402008-01093 ("Ochoa Charge"), filed by Charging Party alleging that she

was discriminated against on the basis of sex and disability in violation of Title VII and the ADA. Charging Party Damiana Ochoa alleges that when she returned from maternity leave, Respondent terminated her employment, after she had worked for Respondent for over eight years as a Cigarette Selector, because she could not pass an agility test referred to as the Industrial Physical Capability Strength Test or "IPCS" test. Ms. Ochoa alleged that Respondent discriminated on the basis of sex, including pregnancy, and that Respondent discriminated against disabled employees and new hires by requiring them to pass the IPCS test before they could return to work after a medical leave or begin work as a new employee. (Attachment 1).

6. On January 11, 2008, the EEOC served the Respondent with notice of Charge 540-2008-01093 and requested a response from Respondent by February 11, 2008. (Attachment 2).

7. On April 25, 2008, Respondent submitted its Position Statement to the EEOC. (Attachment 3).

8. On August 24, 2009 the EEOC sent correspondence to Respondent seeking more information to supplement the Position Statement submitted by Respondent, with a response due by September 18, 2009. (Attachment 4). Among other requests, the EEOC requested that Respondent provide identifying information for individuals who took the IPCS test including their names, genders, last known addresses and phone numbers.

9. On September 17, 2009, Respondent requested an extension until October 19, 2009 in order to provide documents to the EEOC to supplement its Position Statement. (Attachment 5).

10. On October 16, 2009, Respondent once again requested an extension in order to supplement its Position Statement. (Attachment 6).

11. On November 9, 2009, Respondent requested an extension until November 13, 2009 to supplement its Position Statement. (Attachment 7).

12. On November 13, 2009, Respondent provided some of the information requested by the EEOC, but failed to provide identifying information for individuals who took the IPCS test including their names, last known addresses and phone numbers. (Attachment 8).

13. On August 6, 2010, the EEOC notified Respondent that it was commencing a nation-wide investigation into Respondent's compliance with the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq* ("ADEA"). Enclosed in this notification was a consolidated Request for Information for both the ADEA Directed Charge, Charge No. 540-2010-01761, and the Title VII and ADA Charge (Ochoa Charge), Charge No. 540-2008-01093 with responses due by September 6, 2010. (Attachment 9).

14. On September 6, 2010, the EEOC received another charge of discrimination against Respondent. In this Charge, the charging party alleged he was discriminated against by Respondent on the basis of

disability when he was terminated from work because he failed an isokinetic test (IPCS). In order to return to work after his medical leave, he was required to take and pass the IPCS test. This Charge was filed with both the EEOC and the California Department of Fair Employment and Housing.

15. On November 9, 2010, the EEOC informed Respondent that it had separated its consolidated Request for Information for the ADEA and Title VII/ADA charges. (Attachment 10). The EEOC also notified Respondent that it was expanding its Title VII and ADA investigation to all of Respondent's facilities nationwide. Attached to this notification was a Request for Information for the Title VII and ADA charge with response due no later than December 1, 2010. (Attachment 10).

17. On January 14, 2011, Respondent submitted its response to the Request for Information in the Title VII/ADA charge. (Attachment 11). Although Respondent provided some of the information requested, it did not provide several categories of important information.

19. On February 15, 2011, the EEOC issued Subpoena No. PHX-11-32 in its Title VII, and ADA investigation of Respondent, with response due no later than March 11, 2011. (Attachment 12).

20. On February 22, 2011, Respondent submitted to the EEOC a Petition to Revoke or Modify Subpoena PHX-11-32. (Attachment 13).

21. On August 9, 2011, the EEOC was made aware of yet another charge of discrimination against Respondent and its use of the IPCS test. The Charging Party alleged that Respondent discriminated against her on the basis of gender, disability and age by requiring her to take the IPCS test upon her return from a medical leave of absence. This Charging Party was terminated from employment when she failed to pass the test.

22. The EEOC and Respondent met and conferred on August 24, 2011 to resolve any disagreements related to subpoena PHX-11-32. The parties could not agree on two categories of requested information. The two categories are: (1) lists of employees and applicants who were terminated, demoted, or not hired because they failed to pass the IPCS test, including names, last known addresses, phone numbers, and social security numbers for those employees and applicants (Request Nos. 10, 11a, 14, 15), and (2) identifying data regarding employees and applicants who took the test (Request No. 8a-1). (Attachment 12).

23. On March 21, 2012 the EEOC issued a determination, denying Respondent's Petition to Revoke or Modify Subpoena PHX-11-32. The determination directed Respondent to provide the requested information to the EEOC within 20 days. (Attachment 14).

24. In a letter dated May 10, 2012, Respondent advised the EEOC that the data it had I produced contained errors relating to "de-duplication" of duplicate

entries for test-takers who took the IPCS PCE multiple times and that these errors may "impact [the EEOC's] analysis as well." (Attachment 15).

25. As of the date of this Declaration, Respondent has failed to provide the EEOC with many categories of requested information. Specifically, Respondent has not provided the names of employees and applicants, their social security numbers, addresses, and phone numbers. It has also failed to provide information regarding the medical condition, dates of application or hire, the job classification at the time of hire, position held by employee at time test was administered, and the date and reason for termination.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Elizabeth Cadle
Elizabeth Cadle

Date: August 14, 2012.

[Doc. 2-1]

EXHIBIT 1

CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.	Charge Presented To: ☐ FEPA ☒ EEOC Agency(ies) Charge No(s): **540-2008-01093**

Arizona Attorney General's Office, Civil Rights Division and EEOC
State or local Agency, if any

Name *(indicate Mr., Ms., Mrs.)* **Ms. Damiana Ochoa**	Home Phone No. *(Incl. Area Code)* **(623) 444-0257**	Date of Birth **02-22-1977**
Street Address **7026 W. Earll Drive, Phoenix, AZ 85033**	City, State and ZIP code	

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name **MCLANE SUNWEST**	No. Employees, Members **201 – 500**	Phone No. *(Include Area Code)* **(623) 935-7500**

Street Address	City, State, and ZIP Code
14149 W. McDowell Rd., Goodyear, AZ 85395	

Name	No. Employees, Members	Phone No. *(Include Area Code)*

Street Address	City, State, and ZIP Code

DISCRIMINATION BASED ON *(Check appropriate box(es).)*	DATE(S) DISCRIMINATION TOOK PLACE
☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ RETALIATION ☐ AGE ☒ DISABILITY ☐ OTHER *(specify below.)*	Earliest Latest **01-01-2008** ☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*

On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (Physical Capability Strength Test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007 and December 28, 2007, I re-tested and did not pass. I have worked for the above-named employer for over 8 years as a cigarette Selector.

I believe I have been discriminated against because of my sex, female (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.

The Physical Capability Strength Test is given to all employees returning to work from a medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.	NOTARY—*When necessary for State and Local Agency Requirements*
I declare under penalty of perjury that the above is true and correct **Jan 07, 2008** *Date* Damiana Ochoa *Charging Party Signature*	I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. SIGNATURE OF COMPLAINANT SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (*month, day, year*)

[Doc. 2-1]

EXHIBIT 2

EEOC FORM 131 (5/01)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Human Resources Director **MCLANE SUNWEST** **14149 W. Mcdowell Rd.** **Goodyear, AZ 85395**	PERSON FILING CHARGE **Damiana Ochoa**
	THIS PERSON *(Check one or both)* ☒ Claims To Be Aggrieved ☐ Is Filing on Behalf of Other (s)
	EEOC CHARGE NO. **540-2008-01093**

NOTICE OF CHARGE OF DISCRIMINATION
(See the enclosed for additional information)

This is notice that a charge of employment discrimination has been filed against your organization under:

☒ Title VII of the Civil Rights Act
☒ The Americans with Disabilities Act

☐ The Age Discrimination in Employment Act
☐ The Equal Pay Act

The boxes checked below apply to our handling of this charge:

1. ☐ No action is required by you at this time.

2. ☐ Please call the EEOC Representative listed below concerning the further handling of this charge.

3. ☒ Please provide by FEB 11 2008 a statement of your position on the issues covered by this charge, with copies of any supporting documentation to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.

4. ☐ Please respond fully by to the enclosed request for information and send your response to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.

5. ☒ EEOC has a Mediation program that gives parties an opportunity to resolve the issues of a charge without extensive investigation or expenditure of resources. If you would like to participate, please say so on the enclosed form and respond by **25-JAN-08** to **Yvonne Gloria-Johnson, ADR Coordinator, at (602) 640-5022**

If you *DO NOT* wish to try Mediation, you must respond to any request(s) made above by the date(s) specified there.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Deanya B. Barlettt, **ADR Staff Mediator** *EEOC Representative* *Telephone* **(602) 640-5046** Enclosure(s): ☒ Copy of Charge	**Phoenix District Office** **3300 North Central Ave** **Suite 690** **Phoenix, AZ 85012**

CIRCUMSTANCES OF ALLEGED DISCRIMINATION

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGINAL ☐ AGE ☒ DISABILITY ☐ RETALIATION ☐ OTHER

See enclosed copy of charge of discrimination

Date	Name/Title of Authorized Official
JAN 11 2008	**Chester V. Bailey** **District Director**

Signature

/s/ Chester V. Bailey

[Doc. 2-1]

EXHIBIT 3

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
Phoenix, Arizona 85004-2202
602.382.6000
602.382.6070 (Fax)
www.swlaw.com

Ashley T. Kasarjian
602-382-6544
akasarjian@swlaw.com

DENVER
LAS VEGAS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

April 25, 2008

VIA HAND-DELIVERY

Barbara Rusden, Investigator
Equal Employment Opportunity Commission
Phoenix District Office
3300 North Central Avenue, Suite 690
Phoenix, Arizona 85012

Re: *Charge No.:* *540-2008-01093*
Charging Party: *Damiana Ochoa*
Respondent: *McLane Sunwest, Inc.*

Dear Ms. Rusden:

As previously advised, this law firm represents the Respondent, McLane Sunwest, Inc. (hereinafter referred to as "McLane") in the above-referenced matter. This letter constitutes McLane's position statement in response to the Charge of Discrimination filed by Damiana Ochoa (hereinafter "Charging Party").

McLane reserves the right to object to the admissibility of this submission in any subsequent litigation. This letter constitutes a response to an agency request for information only. Additional facts may be discovered under Federal or State Rules of Procedure in any subsequent litigation.

I. THE CHARGE

Charging Party filed a Charge of Discrimination against McLane on January 7, 2008 alleging that she was discriminated against because of her sex (female) and alleged disability (pregnancy). *See* Charge of Discrimination, attached as Exhibit 1. McLane denies the allegations in their entirety and, as the facts below make clear, submits that Charging Party has not been discriminated against in any way.

II. MCLANE SUNWEST

McLane Sunwest is a grocery distribution center located in Goodyear, Arizona. Since opening this division of McLane Company, Inc. in 1985, it has provided services to its customers located in Arizona, Nevada, New Mexico and Texas. McLane has been, and remains, committed to developing dedicated, well-trained teams that are focused on excellence.

As an Equal Opportunity Employer, McLane prohibits discrimination in every aspect of the employment relationship. *See* EEO Policy (I-3), attached as Exhibit 2; and EEO Handbook Provision, attached as

Exhibit 3. Employees are encouraged to report any alleged discrimination to their Human Resources Manager, Division President, General Manager or Home Office representative. *Id.*

McLane also is committed to protecting the safety and health of all employees and ensuring an accident-free environment. *See* Safety Program (V-1), attached as Exhibit 4. To that end, McLane has an extensive training program, including pre-shift stretch and flex sessions, safety committees, and safety celebrations.

All employees are given a copy of the Teammate Handbook which provides information regarding various work guidelines, programs, and practices of McLane. Following her hire, Charging Party was given a copy of the Teammate Handbook. Charging Party acknowledged that she received and familiarized herself with the handbook. *See* Signed Receipt, attached as Exhibit 5.

III. FACTUAL BACKGROUND

McLane hired Charging Party as a Selector II/ Mezzanine Selector on May 30, 2000. *See* Employment Application, attached as Exhibit 6. In this position, Charging Party was required to perform various physical tasks, such as: (1) pulling stacks of 25 empty totes to staging area (which required up to 145 lbs. of force); (2) lifting totes off stacks and placing on roller belt; (3) pushing/pulling totes up or down the roller belt; (4) stocking shelves; (5) and lifting/lowering/carrying/

sliding 40 lb. wooden pallets. *See* Job Description, attached as Exhibit 7.

All such positions at McLane are assigned either the "Medium-Heavy" or "Heavy" category based upon the job requirements. *See* Job Categories with Lifting Specifications, attached as Exhibit 8; and Physical Demands Strength Definitions, attached as Exhibit 9. As a Selector II, Charging Party's position was in the less strenuous category—namely Charging Party's position required "Medium-Heavy" lifting. *Id.*

On June 25, 2007, Charging Party requested and was granted Family and Medical Leave for prenatal care and the birth of her child. *See* FMLA Request, attached as Exhibit 10; *see also* FMLA Policy, attached as Exhibit 11.[1] Charging Party took the requested FMLA leave, and on approximately October 31, 2007, she was ready to return to work and take the required "Return to Work" test.

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[1] As further evidence of the fact that McLane has not discriminated against Charging Party because of her pregnancy, she had previously requested and was granted FMLA leave for the birth of a child. Upon concluding her FMLA leave, she successfully completed the required "Return to Work" test, and was promptly reinstated.

A. Industrial Physical Capability Strength Testing

1. General Information Regarding "Return to Work" Testing

In order to ensure that employees are capable of safely performing their job, all newly hired employees, and employees returning from an absence of thirty days or more, are required to take the Industrial Physical Capability Strength Test (referred to as "the test" or "IPCS test").[2] *See* Pre/Post Employment Physical Requirements Policy at 2, attached as Exhibit 12; and Notice to All Applicants for Employment, attached as Exhibit 13. If an employee cannot meet the minimum requirements to pass the test, the employee may be given an opportunity to retest. *See* Physical Capability Services Manual at 11, attached as Exhibit 14. During this time, an employee is encouraged to work to enhance their overall physical capability.

Industrial Physical Capability Services, Inc. ("IPCS"), oversees the testing in order to ensure objectivity, validity, and reliability. Over the past thirty years, IPCS has provided its standardized capability assessments to numerous industrial clients in the trucking, distribution, airline, manufacturing and utility industries. The process utilized by IPCS has been

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[2] In 2007, only one other female took the IPCS "Return to Work" test at McLane's Sunwest location as a result of taking leave for pregnancy/childbirth. This employee passed the test and returned to work.

evaluated by Thomas G. Abram, a Shareholder at Vedder Price law firm, who has provided his independent opinion that IPCS testing conforms with Title VII, the ADA, the ADEA, Executive Order 11246 and all published regulations and guidelines relating to employment testing, including the Uniform Guidelines on Employee Selection Procedures. *See* January 14, 2005 Opinion Letter, attached as Exhibit 15.

In addition, numerous comparative studies have evaluated the effectiveness of IPCS testing on the reduction in the frequency and severity of injuries. For example, in a 16-month analysis of new employees who were evaluated by IPCS testing, there was a 70.5% reduction in the incident rate of injury. In another study, 14 food distribution locations took part in a 35-month study that concluded that there was a dramatic impact on the reduction of the frequency and severity of injuries.

2. The IPCS Testing Process

In order to match the physical capabilities of the worker to the physical demands of a particular job, a Job Task and Physical Activities Analysis is performed. This analysis determines the target physical capability score an employee will be required to meet to pass the test. *See* Sample Job Task Analysis Reports, attached as Exhibit 16. Thus, employees take the IPCS test that is specific to their position at McLane.

McLane employees go to an approved clinic, with trained IPCS providers, to take the standardized test

that is specific to their jobs and the corresponding GMSA Job Task Analysis. The test is then performed on an isokinetic machine that focuses on the major muscle groups of the shoulders and legs, as strength in these two areas is necessary when performing the essential functions of the job. *See* Manual at 11, attached as Exhibit 14. The machine allows a dynamic evaluation of specific movement patterns and accommodates an individual's weaknesses and strengths by providing resistance equal to the force applied against the machine.

IPCS analyzes the results of the test by applying a validated mathematical model that generates the IPCS physical capability index score. *Id.* at 11-12. After this evaluation, the results are sent directly to the employer, with details regarding the specific findings and the data used to produce the results. *See* Sample Results, attached as Exhibit 17.

IPCS testing is critical at McLane as the job positions are physically demanding. For example, a Selector II may pick approximately 2,300 pieces of product from racks to place in totes, filling 1,000 totes per shift. *See* Job Description, attached as Exhibit 7.[3]

---

[3] The importance of such tests is underscored by Charging Party's own work history that includes a "Safety Intervention" for wrist and forearm pain. *See* Safety Intervention, attached as Exhibit 18; Injury Statement, attached as Exhibit 19; and "Supervisor's Accident/Incident Investigation Report" Regarding Gradual Pain, attached as Exhibit 20.

B. Charging Party's IPCS Testing

On November 11, 2007, Charging Party took the required IPCS test to return to work. *See* 11/1/07 IPCS Test Results, attached as Exhibit 21. She was required to meet the "Medium-Heavy" score requirement for her position, which is the lowest score requirement for a position at McLane. To pass the test, Charging Party was required to receive an IPCS score greater than 1.32 (which signifies the total torque divided by the body weight[4]). Charging Party received a score of .77. Based on this score, it was determined that Charging Party did not meet the minimum physical demands of the essential functions of the position and, thus, failed the test.

In the event an employee fails the first test, the employee is allowed to retest *one* time. *See* Pre/Post Employment Physical Requirements Policy at 2, attached as Exhibit 12.[5] Therefore, Charging Party was allowed to take the test for a second time. *See* 11/19/07 IPCS Test Results, attached as Exhibit 22. On November 19, 2007, Charging Party took the "Return to Work" test and received an IPCS score of 0.93. *Id.* Based on

---

[4] Body weight must be taken into account in the scoring, because muscle strength is required to support body weight, in addition to the muscle strength used to execute the job functions.

[5] An employee is also given the opportunity to apply for another available position for which he/she is qualified, provided he/she is able to pass the designated test. However, in this situation, Charging Party was already working in a position that had the *minimum* score requirement (of "Medium-Heavy"). Because Charging Party could not pass the IPCS test for her position, she would be unable to pass the test for *all* positions.

this score, Charging Party, again, did not meet the minimum physical demands of the essential functions of her position and failed the test.

Despite the policy providing only one retest, Charging Party was given the opportunity to take the exam a third time. On December 27, 2007, Charging Party took the test and failed for the third time. *See* 12/27/07 IPCS Test Results, attached as Exhibit 23. Notably, this time her score went down from her previous testing as she only scored 0.91. *Id.*

As a result of Charging Party's third failure, IPCS concluded that she was unable to meet the minimum qualifications to perform the essential functions of her job, and thus, in accordance with McLane's policies and procedures, her employment was terminated on January 9, 2008. *See* Change Document, attached as Exhibit 24.

IPCS TESTING RESULTS		
Date of IPCS Testing	**Charging Party's Score**	**Required Score for Selector Position**
11/11/2007	0.77	1.32
11/19/2007	0.93	1.32
12/27/2007	0.91	1.32

IV. LEGAL DISCUSSION

A. Disability Discrimination

In order to establish a *prima facie* case of disability discrimination, Charging Party must establish that: (1) she is disabled; (2) she is qualified, with or without accommodation, to perform the essential functions of the job; and (3) the Company terminated her because of her disability. *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 271 (9th Cir. 1996).

First, Charging Party has not established she has a qualifying disability under the ADA. In order to establish that she is disabled, Charging Party must show that she has "a physical or mental impairment which substantially limits one or more of the major life activities . . . " 42 U.S.C. § 12112(a). "Consistent with the EEOC's Interpretive Guidance, many courts have held that pregnancy, absent abnormal or unusual circumstances, is not a disability." *Gabriel v. City of Chicago*, 9 F.Supp.2d 974, 980 (Ill. 1998) (external citations omitted).

Moreover, even if Charging Party could establish that she was disabled under the ADA, she was unable to perform the essential functions of the job. In this case, "[t]he function [is] essential because the reason the position exists is to perform that function." *See* 29 C.F.R. § 1630.2(n)(2)(i). The Selector II position is categorized as "Medium-Heavy", which is the least physically demanding category at McLane. However, even so, Charging Party could not perform the essential

functions of the job, with or without an accommodation. Allowing her to perform a job which she is not capable of performing the essential functions would put her and other employees at risk of serious harm.

IPCS testing is applied equally to all applicants and employees returning from more than 30 days leave, regardless of the reason for that leave. An employee is given the standardized test specific to his or her position, and the results are analyzed by IPCS by applying a validated mathematical model that generates the IPCS physical capability index score. As such, Charging Party's claims of discrimination are without merit.

Without any evidence to support Charging Party's allegation of a discriminatory motive, the business judgment of the employer will not be second-guessed. *Foster v. Andersen, L.L.P.*, 168 F.3d 1029, 1035 (7th Cir. 1999) ("we do not sit as a super-personnel department that reexamines an employer's personnel decisions"); *Simms v. Oklahoma*, 165 F.3d 1321, 1330 (10th Cir. 1999) ("[o]ur role is . . . not to act as a 'super personnel department' that second guesses employers' business judgments").

B. Sex Discrimination—Title VII

In order to prevail on a charge of discrimination under Title VII, Charging Party must offer either direct evidence of discrimination or prove discrimination through the burden-shifting analysis identified in *McDonnell Douglas. McDonnell Douglas Corp. v. Green*,

411 U.S. 792 (1973). In order to produce specific evidence that her sex was the reason for the personnel decisions at issue, Charging Party cannot rely on mere speculation or her own subjective conclusions. The courts consistently have held that such conclusory allegations and subjective beliefs are "wholly insufficient evidence to establish a claim of discrimination as a matter of law." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (6th Cir. 1992).

In the instant matter, Charging Party offers no direct evidence of discrimination. Therefore, she must establish a *prima facie* case of discrimination by showing that: (1) she is a member of a protected class, (2) she was capable of performing her job in a satisfactory manner, (3) she suffered an adverse employment decision, and (4) she was treated differently on the basis of her pregnancy. *Ford v. Sheriff-Coroner's Dep't of Contra-Costa County*, 1998 WL 898468 (N.D. Cal. 1998).

If Charging Party can satisfy these elements, the burden of production shifts to McLane to articulate a legitimate, non-discriminatory reason for terminating Charging Party. *McDonnell Douglas*, 411 U.S. at 800-01. If McLane satisfies this burden of production, there is no presumption of discrimination, and thus, the ultimate burden is on Charging Party to prove that McLane's reason was merely a pretext for discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

1. *Charging Party Cannot Establish That She Was Terminated Based On Her Pregnancy*

Charging Party is unable to establish the requisite elements of her *prima facie* case of pregnancy discrimination. Even assuming Charging Party belonged to a protected class at the time of her termination, she cannot establish that she was either capable of performing her job as required or that she was treated differently based on her sex.

Every new hire and employee returning after 30 or more days of leave is required to take the IPCS "Return to Work" testing. "Return to Work" testing is common in this industry, as with others, to protect the employee's own safety since an employee must be physically capable of performing the essential functions of his or her position. *See e.g. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (the test should be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated"); *see also, Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (discussing validation of job-related tests).

IPCS testing is essential for the positions at McLane, which involve physical activities such as lifting/lowering, carrying, pushing/pulling, reaching, bending/twisting, crouching/stooping/squatting, crawling/kneeling, climbing/stepping, kicking, walking, standing, and sitting. *See, e.g., Porter v. State of Kan.*, 757 F.Supp.

1224, 1230-31 (D. Kan. 1991) (holding that the requirement that a psychiatric aide should be able to lift more than 40 pounds is facially-neutral with regard to pregnancy and even if there was an impact on pregnant women, it is justified by "business necessity").

Notably, Charging Party previously had taken a "Return to Work" test after a pregnancy, passed, and returned to her position. However, this time, Charging Party took and failed the test with the lowest weight classification ("Medium-Heavy") *three* times—indeed, one attempt more than typically allowed at McLane. Moreover, on her third attempt, her score went *down* from her second score. Charging Party was not capable of performing the essential functions of her job, and was not treated differently based on her sex.

2. *McLane Had Legitimate, Non-Discriminatory Reasons for Its Actions*

Even assuming Charging Party could establish a *prima facie* case, which she cannot, McLane had legitimate, non-discriminatory reasons for its actions. As evidenced by the discussion above, Charging Party has not shown that her termination was related to her pregnancy. Rather, McLane had a legitimate, non-discriminatory reason to support its decision.

Specifically, McLane has thoroughly documented and validated test results administered through a third party, IPCS. The isokinetic testing data is objectively evaluated and processed at the IPCS corporate office. Upon completion of the processing, the results are sent to McLane, which include the determination

as to whether the employee is capable of performing the essential functions of his or her position. Charging Party was given the opportunity to take the IPCS testing three times but failed each test. Further, all of Charging Party's scores were below the minimum IPCS score for her position.

Without any evidence to support Charging Party's allegations of a discriminatory motive, courts have repeatedly held that it is not the prerogative of a court or agency to second-guess management's business judgment or its decision that an employee's performance was unsatisfactory. *See Meching v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988); *Foster v. Arthur Anderson, L.L.P.*, 168 F.3d 1029, 1035 (7th Cir. 1999); *Simms v. Oklahoma Dept. of Mental Health*, 165 F.3d 1321, 1330 (10th Cir. 1999). McLane has the right to set legitimate performance expectations for its employees and to terminate those employees who fail to meet the standards.

V. CONCLUSION

For all of the foregoing reasons, McLane respectfully requests that a no-cause determination be issued.

Very truly yours,

Snell & Wilmer

/s/ Ashley Kasarjian
Joshua Woodard
Ashley Kasarjian

AK/ad
Attachments (Exhibits)

[Doc. 2-1]

EXHIBIT 4

[SEAL]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
(866) 408-8075
TTY (602) 640-5072
FAX (602) 640-5071

August 24, 2009

Ashley T. Kasarjian
Snell & Wilmer
One Arizona Center
Phoenix, AZ 85004-2202

Re: Damiana Ochoa v. McLane Sunwest
Charge No. 540-2008-01093

Dear Ms. Kasarjian:

Please respond to the following by September 18, 2009.

1. Submit a copy of any and all policies of Respondent that require any new hire and/or employee to take the Industrial Physical Capability Strength (IPCS) test, including any policy requiring an employee returning from leave in excess of 30 days to take the IPCS test. If actual practice is different from the written policy, describe actual practice.

2. Describe in detail how the results of the IPCS test are interpreted, including:

a. How are IPCS test results conveyed from the test administrator to Respondent?

b. What is the passing score for each job position for which the IPCS test is in use?

c. Who determines the score necessary to "pass" the IPCS test?

d. What methods are used in determining the score necessary to "pass" the IPCS test?

e. Provide the date on which the IPCS test was first administered to any employee or new hire (whether prospective or actual) of Respondent.

3. Submit copies of any and all validity studies conducted by the Respondent and/or Industrial Physical Capability Services in connection with use of the IPCS test and/or its results with respect to any employee or new hire (whether prospective or actual) of Respondent.

4. Submit copies of any and all correspondence between Respondent and Industrial Physical Capability Services in connection with use of the IPCS test and/or its results, including but not limited to instructions for interpreting test results, information regarding usage of the test, and contracts.

5. Submit an electronic database[1] identifying all individuals (whether employees, prospective new

---

[1] "Electronic database" shall mean a native electronic file submitted on a compact disc (CD-ROM) that can be opened and sorted by Microsoft Excel (such as Microsoft Excel Files (".XLS") and comma delimited files (".CSV")) wherein the first row of the

hires, or actual new hires) given the IPCS test from January 1, 2006 to present date at Respondent's direction. For each, provide the following information:

a. employee identification number;

b. first name;

c. last name;

d. date of hire;

e. date of birth;

f. gender;

g. reason for administration of the test;

h. date(s) of test;

i. indicate if the individual passed or failed;

j. position title;

k. last known home address and telephone numbers.

6. Provide a listing of all position titles and all position descriptions in use at Respondent's facilities from January 1, 2006 to the present.

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database contains the field or variable names of the requested information and each subsequent row of the database shall contain the requested information for each individual identified. Image files (such as PDF or TIF files) and printed copies of the database do not satisfy this request.

7. Submit a complete copy of Charging Party's personnel file, including but not limited to any correspondence regarding the IPCS test administered to Charging Party.

8. Submit copies of any and all adverse impact analyses completed in conjunction with Respondent's employees or new hires who took the IPCS test from January 1, 2006 to present date.

9. Submit copies of any and all internal correspondence relating to, concerning, or memorializing Respondent's decision to implement, use, or discontinue the IPCS test.

10. Identify the facility where Charging Party took her IPCS test, including the provider name and location, and identify the person who administered the test to Charging Party.

11. Identify any and all individuals acting as liaison between Respondent and Industrial Physical Capability Services in connection with the IPCS test.

12. Submit an electronic database identifying all individuals employed by the Respondent from January 1, 2006 to present date. For each, provide the following information:

    a. employee identification number;

    b. first name;

    c. last name;

    d. date of hire;

    g. date of birth;

f. gender;

g. position title.

Thank you for your cooperation.

Sincerely,

/s/
Barbara Rusden
Investigator
(602) 640-5054

* * *

[Doc. 2-1]

EXHIBIT 8

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
400 East Van Buren Street
Suite 1900
Phoenix, AZ 85004-2202
602.382.6000
602.382.6070 (Fax)
www.swlaw.com

DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

Ashley T. Kasarjian
602.382.6544
akasarjian@swlaw.com

November 13, 2009

VIA HAND-DELIVERY

Barbara Rusden, Investigator
U.S. Equal Employment Opportunity Commission
3300 N. Central Avenue, Suite 690
Phoenix, Arizona 85012-2504

Re: *Damiana Ochoa v. McLane Sunwest*
Charge No. 540-2008-01093-2504

Dear Ms. Rusden:

In response to your request for additional information and documents, McLane Sunwest ("Respondent" or "McLane Sunwest") provides the following supplementation to the Position Statement it submitted on April 25, 2008 ("Position Statement"):

REQUEST NO. 1:

Submit a copy of any and all policies of Respondent that require any new hire and/or employee to take the Industrial Physical Capability Strength (IPCS) test, including any policy requiring an employee returning from leave in excess of 30 days to take the IPCS test. If actual practice is different from the written policy, describe actual practice.

RESPONSE TO REQUEST NO. 1:

See Respondent's Position Statement Exhibit 12, Pre/Post Employment Physical Requirements Policy; and Respondent's Position Statement Exhibit 13, Notice to All Applicants for Employment. Additionally, Respondent's policy related to its safety program was

provided at Respondent's Position Statement Exhibit 4. As emphasized in the safety policy, the safety and health of all its employees is a high priority for McLane Sunwest. In addition to the procedures outlined in the Pre/Post Employment Physical Requirements Policy, individuals may be permitted to take the IPCS test for a third time, in certain circumstances.

As indicated in the Pre/Post Employment Physical Requirements Policy, not all positions at McLane Sunwest require a functional capacity evaluation ("FCE"). Rather, a FCE is required only for those positions with essential functions that include physical tasks such as lifting, pushing, carrying, pulling and standing for long periods of time as determined through a job task evaluation. As noted in the Policy, if an individual is unable to successfully complete the FCE for the particular position, he/she may apply for another available position for which he/she is qualified. One of the qualifying criteria is the ability to pass the designated FCE, if such evaluation is necessary because of the essential functions of the position sought. If an individual does not meet the minimum physical demands to perform the essential functions of the job sought, McLane Sunwest will determine whether alternative positions exist for which the individual is qualified. For example, if an individual is not qualified for a job with Medium-Heavy physical requirements, he/she may be capable of performing a job with Medium physical requirements,

which is the least of the physically demanding positions at Respondent's facility.[1] Alternatively, McLane Sunwest considers whether an administrative position is available for which the individual is qualified. Because the essential functions of the job are not physically demanding, Respondent does not require individuals in administrative positions to participate in a FCE.

REQUEST NO. 2:

Describe in detail how the results of the IPCS test are interpreted, including:

a. How are IPCS test results conveyed from the test administrator to Respondent?

b. What is the passing score for each job position for which the IPCS test is in use?

c. Who determines the score necessary to "pass" the IPCS test?

d. What methods are used in determining the score necessary to "pass" the IPCS test?

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[1] In Respondent's initial position statement, it was noted that Medium-Heavy was the minimum requirement for all positions at Respondent's facility. Upon further review, it is noted that there is one position, Inventory Control, with only Medium physical demands. However, this position is irrelevant to the analysis of this Charge of Discrimination because Charging Party's evaluation revealed that she was only qualified to perform jobs with Medium-Light physical requirements.

e. Provide the date on which the IPCS test was first administered to any employee or new hire (whether prospective or actual) of Respondent.

RESPONSE TO REQUEST NO. 2:

a. The IPCS test results are conveyed from IPCS to McLane Sunwest via email. *See* the summary of Charging Party's test results previously provided with Respondent's Position Statement, Exhibits 21-23. A sample test result form, with definitions of terms, was also provided with Respondent's Position Statement, Exhibit 17. Additionally, the IPCS Scheduling Manual provides sample reports and was submitted with Respondent's Position Statement, Exhibit 14.

b. The essential functions of each position are evaluated to identify the physical requirements for the specific job. For positions without physically demanding functions, no FCE is required. For those positions that are physically demanding, a Job Task Analysis ("JTA") is prepared detailing the physical requirements for performing the essential functions of the job.[2] The physical job requirements determine the correlating IPCS rating for the position. The passing scores specific to the observed physical requirements of the different positions are identified on the Physical

[2] Job functions are evaluated through direct, in-person observation and through measurement. For example, the Job Task Analysis for Mezzanine Selector (Exhibit 42) was developed through observation and analysis by a third-party job evaluator, General Management Solutions, Inc.

Demands Strength Definitions that was previously provided with Respondent's Position Statement, Exhibit 9. The physical demand ratings for those positions at McLane Sunwest that require an FCE are attached hereto as *Exhibit 25*.

c. Passing scores correlate to the physical demand ratings assigned based on the JTA. IPCS determines the numerical IPCS capability score that correlates with the physical requirements of the position.

d. Data management, processing and evaluation are conducted by IPCS. *See* the documentation attached to this correspondence as *Exhibit 26*, The IPCS Score—What Is It?; and *Exhibit 27*, Physical Capability Evaluation Proposal Presented to Company.

e. The IPCS evaluation was first administered on behalf of Respondent on October 25, 2006.

REQUEST NO. 3:

Submit copies of any and all validity studies conducted by the Respondent and/or Industrial Physical Capability Services in connection with use of the IPCS test and/or its results with respect to any employee or new hire (whether prospective or actual) of Respondent.

RESPONSE TO REQUEST NO. 3:

See the documentation attached to this correspondence as *Exhibit 28*, The Effectiveness of the IPCS Physical Capability Evaluation Process for McLane Food Service Company, A Validation Study; and *Exhibit 29*, An Injury Analysis To Determine the Effectiveness of the IPCS Physical Capability Evaluation (PCE) Program On Injury Claim Costs, McLane Company.

Additionally, IPCS undertakes regular and consistent validation and analysis. IPCS obtained legal opinions from Vedder Price based on the law firm's independent analysis of the validation studies conducted by IPCS. The January 14, 2005 opinion is provided at Respondent's Position Statement *Exhibit 15*. Additionally, the April 21, 2008 opinion is attached to this correspondence as *Exhibit 30*, and the August 23, 2002 opinion is attached to this correspondence as *Exhibit 31*. The documentation attached to this correspondence as *Exhibits 32-38*, are additional analyses of injury data performed by IPCS.

REQUEST NO. 4:

Submit copies of any and all correspondence between Respondent and Industrial Physical Capability Services in connection with use of the IPCS test and/or its results, including but not limited to instructions for interpreting test results, information regarding usage of the test, and contracts.

RESPONSE TO REQUEST NO. 4:

The IPCS Scheduling Manual provides sample reports to assist in interpreting the evaluation results. *See* Respondent's Position Statement Exhibit 14.

REQUEST NO. 5:

Submit an electronic database identifying all individuals (whether employees, prospective new hires, or actual new hires) given the IPCS test from January 1, 2006 to present date at Respondent's direction. For each, provide the following information:

a. employee identification number;

b. first name;

c. last name;

d. date of hire;

e. date of birth;

f. gender;

g. reason for administration of the test;

h. date(s) of test;

i. indicate if the individual passed or failed;

j. position title;

k. last known home address and telephone numbers.

RESPONSE TO REQUEST NO. 5:

See the documentation attached to this correspondence as *Exhibit 39* (provided in hard copy and electronic format). Please note that the reason for the administration of the test is identified as either: (1) New Hire, (2) Readiness, or (3) Complimentary. The "New Hire" designation includes all candidates who sought and were conditionally offered a particular position identified as physically demanding such that a FCE was necessary. The "Readiness" designation includes employees who returned to work after an absence of 30 or more days, as well as individuals who were seeking a promotion to a job that was more physically demanding than their current job. Employees who sought such a promotion but did not, at that time, qualify to perform the essential functions of the more physically demanding position, were eligible to return to their original positions. The "Complimentary" designation refers to administrative or management employees who voluntarily took the FCE to familiarize themselves with the process. Those individuals were not required to meet any physical capability requirements.

REQUEST NO. 6:

Provide a listing of all position titles and all position descriptions in use at Respondent's facilities from January 1, 2006 to the present.

RESPONSE TO REQUEST NO. 6:

A chart of Respondent's position titles for employees who are required to take the IPCS evaluation and also hourly administrative/office staff positions is attached to this correspondence as *Exhibit 40*. The Job Task Analysis Reports for those positions identified as physically demanding are attached to this correspondence as *Exhibits 41-54*.

REQUEST NO. 7:

Submit a complete copy of Charging Party's personnel file, including but not limited to any correspondence regarding the IPCS test administered to Charging Party.

RESPONSE TO REQUEST NO. 7:

Charging Party's personnel file is attached to this correspondence as *Exhibit 55*, and her confidential file is attached to this correspondence as *Exhibit 56*. Charging Party was provided the IPCS Scheduling Manual, attached to Respondent's Position Statement, *Exhibit 14*. Additionally, employees who do not successfully complete the FCE on their first attempt are encouraged to work to enhance their physical capabilities, and are provided with resources to assist them. *See, e.g.*, Training Information and Strengthening Chapter in Dr. Tom Gilliam's Materials, attached to this correspondence as *Exhibit 57*.

To assist employees and enable them to prepare for the FCE, McLane Sunwest provides those employees who anticipate being on leave that may exceed 30 consecutive calendar days with the IPCS Advisement Letter, attached to this correspondence as *Exhibit 58*. Employees whose absence exceeds 30 consecutive calendar days are provided the IPCS Return-to-Work Letter, attached to this correspondence as *Exhibit 59*. Applicants with a conditional job offer for a particular position are given the Pre-employment Functional Capabilities Evaluation Notice and the Physical Capability Strength Test: One Component of the New Hire Selection Process summary, attached to this correspondence as *Exhibits 60-61*.

Additionally, all employees, including new hire employees, are given the IPCS Physical Capability Strength Test summary document that provides a brief description and understanding of the IPCS evaluation, the Guidelines for Physical Capability Assessment, and the IPCS Applicant Information Page, attached to this correspondence as *Exhibits 62-64*.

REQUEST NO. 8:

Submit copies of any and all adverse impact analyses completed in conjunction with Respondent's employees or new hires who took the IPCS test from January 1, 2006 to present date.

RESPONSE TO REQUEST NO. 8:

Respondent does not have any documents responsive to this request.

REQUEST NO. 9:

Submit copies of any and all internal correspondence relating to, concerning, or memorializing Respondent's decision to implement, use, or discontinue the IPCS test.

RESPONSE TO REQUEST NO. 9:

Respondent has been unable to locate any documents responsive to this request.

REQUEST NO. 10:

Identify the facility where Charging Party took her IPCS test, including the provider name and location, and identify the person who administered the test to Charging Party.

RESPONSE TO REQUEST NO. 10:

Charging Party took the IPCS functional ability evaluation at Valley Rehab in Goodyear. McLane Sunwest does not participate in the actual evaluation. McLane Sunwest's primary contact at Valley Rehab in Goodyear is Mr. Ken Lundeen.

REQUEST NO. 11:

Identify any and all individuals acting as liaison between Respondent and Industrial Physical Capability Services in connection with the IPCS test.

RESPONSE TO REQUEST NO. 11:

The test administrators at Valley Rehab, insofar as they administer the test, act as liaisons between Respondent and Industrial Physical Capability Services.

REQUEST NO. 12:

Submit an electronic database identifying all individuals employed by the Respondent from January 1, 2006 to present date. For each, provide the following information:

a. employee identification number;

b. first name;

c. last name;

d. date of hire;

e. date of birth;

f. gender;

g. position title.

RESPONSE TO REQUEST NO. 12:

See the documentation attached to this correspondence as Exhibit 39, which includes the employees and applicants with a conditional job offer for a particular position that are required to participate in an IPCS functional capacity evaluation.

Very truly yours,

Snell & Wilmer

/s/ Ashley Kasarjian
Joshua Woodard
Ashley Kasarjian

[Doc. 2-1]

EXHIBIT 9

[SEAL]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
(866) 866 [sic]-8075
TTY (602) 640-5072
FAX (602) 640-5071

Bobby Carlson, President
McLane Sunwest
14149 W. McDowell Road
Goodyear, AZ 85323

RE: **EEOC v. McLane Company**
Charge Number: 540-2010-01761

Dear Mr. Carlson:

This is to inform you that the Equal Employment Opportunity Commission (EEOC) is reviewing the compliance status of your organization under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626 et. seq. (ADEA). This is a nationwide investigation of all facilities owned and/or operated by McLane Company. Please submit the information requested in the enclosed Request for Information (for Charge Numbers 540-2010-01761 EEOC v. McLane Company and 540-2008-01093 Ochoa v. McLane Sunwest) **on or before September 6, 2010** in both *hardcopy and electronic format.* The ADEA provides the EEOC with broad enforcement and investigative powers. This authority is restated at 29 C.F.R. § 1626.4 and 1626.15(a).

Section 1626.4 provides, in relevant part:

> "The Commission may, on its own initiative, conduct investigations of employers, employment agencies and labor organizations, in accordance with the powers vested in it pursuant to Sections 6 and 7 of the Act."

Section 1626.15(a) provides as follows:

> "As provided in Sections 9, 11, 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209, 211, 216 and 217) (FLSA) and Sections 6 and 7 of this Act [ADEA], the Commission and its authorized representatives may (1) investigate and gather data; (2) enter and inspect establishments and records and make transcripts thereof; (3) interview employees; (4) impose on persons subject to the Act appropriate record keeping and reporting requirements; (5) advise employers, employment agencies and labor organizations with regard to their obligations under the Act and any changes necessary in their policies, practices and procedures to assure compliance with the Act; (6) subpoena witnesses and require the production of documents and other evidence; (7) supervise the payments of amounts owing pursuant to section 16(c) of the FLSA, and (8) institute action under section 16(c) or section 17 of the FLSA, or both, to obtain appropriate relief."

Your anticipated cooperation is appreciated. All questions or inquiries should be directed to Barbara Rusden at (602) 640-5054.

Sincerely,

Date: AUG 06 2010

/s/ Rayford O. Irvin
Rayford O. Irvin
Acting District Director
Phoenix District Office

Enclosure

cc: Joshua Woodward, Snell & Wilmer
Ashley Kasarjian, Snell & Wilmer

REQUEST FOR INFORMATION
A D E A Directed v. McLane Company, Inc.
Charge Number 540-2010-01761
and
Ochoa v. McLane Sunwest
Charge No. 540-2008-01093

Relevant time period: January 1, 2006 to present date

Respondent: McLane Company, Inc. (all facilities/ locations nationwide including corporate)

1. Submit the name, title, address and telephone number of the person to whom further inquiries regarding these charges should be directed.

2. Provide the correct legal name and business address of the Respondent named in each charge and describe the nature of Respondent's business. Include any and all trade names, d/b/a's, or former names. Also include documentation either already in existence or prepared by Respondent in response to this request that describes or provides the following information:

    a. the type of corporate or business entity

    b. approximate number of employees during calendar years 2007 and 2008

    c. location of corporate headquarters

d. current status of the corporation, i.e. active, inactive, or another status

e. the name of Respondent's corporate officers, directors, and owners

f. the statutory agent for Respondent in Arizona

g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

i. Provide the legal name and business address of all superior and subordinate business entities identified.

ii. Provide the statutory agent for all superior and subordinate business entities identified.

3. Does the Respondent have a policy of liability insurance that will provide coverage for the claims asserted in these charges? If so, please provide a copy of the policy.

4. Submit a copy of any employee handbook in effect during the relevant time period and

a. explain in detail how this information is disseminated to employees, and

b. provide the date when any employee handbook went into effect, and the dates of any revisions.

5. List each test used by Respondent during the relevant time period, including but not limited to Industrial Physical Capability Strength test (IPCS)

and Isokinetic Physical Capability Test (IPCT), and list any variations of each test in use.

a. For each test variation listed, identify all jobs or job classifications for which it has been used.

6. For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #5 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:

a. describe how the test was developed and how it is used by Respondent,

b provide the name of each test's or variation's author or creator; the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

c. describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the process. Include all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include any and all documents reviewed by any key decision makers in addition to paragraph 7 below,

d. specify the effective dates of use of each test or variation at each of Respondent's locations,

e. provide any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for

individual(s) who administer the test and individual(s) who take the test,

f. provide a description of how each test or variation is administered and scored. Include a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

g. provide a list of all jobs and job classifications for which any test or variation is used;

h. for each job or job classification for which a test or variation is used, identify the specific test or variation (listed in response to paragraph 5) used for that job or job classification,

i. for each job or job classification for which a test or variation is used, identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide details on the process by which any scoring/classification system was established, and provide details about the process by which Respondent determined the minimum score considered "passing.".

j. for each job or job classification for which a test or variation is used, provide job descriptions.

k. provide copies of any and all adverse impact studies performed for each test or variation.

7. Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #5 and #6 above, to include any notes or other documents concerning development and implementation of the test by Respondent.

8. For all positions at Respondent's facilities/ locations nationwide for which any test or variation identified in #5 and #6 above is used, provide the Job Task Analysis for each position. Include:

   a. a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and

   b. any documents and/or videos containing job analysis information for all positions wherein testing is applied to employees and/or new hires.

9. For the relevant time period, provide documents or a listing* of information identifying all persons who took any test or variation identified in #5 and #6 in connection with employment at any of Respondent's locations or facilities nationwide. Provide a separate list for each facility/location nationwide and annotate the list by:

---

* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of birth

g. date of application

h. date of hire (or promotion), and job classification at hire (or promotion)

i. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

j. position held at the time test was administered (for individuals employed at the time or returning to work)

k. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

10. Provide a list of all Respondent's facilities and locations in existence during the relevant time period.

11. For all Respondent facilities/locations nationwide during the relevant time period and with respect to any test or variation identified in #5 and #6 above, provide documents or a list* of information identifying all persons by name, last known home address and telephone number, and social security number, who were:

    a. terminated because of an inability to pass any test or variation,

    b. reassigned and/or transferred because of an inability to pass any test or variation,

    c. not hired because of an inability to pass any test or variation,

    d. not promoted because of an inability to pass any test or variation,

12. For each person identified in 11(a) through 11(d), provide:

    a. date of termination, reassignment, transfer, not hired or not promoted,

    b.. name and title of the individual who made the decision to terminate, reassign, not hire and/or not promote the person based on test results.

13. For each test or variation identified in #5 or #6, provide any and all evidence which shows any change, whether a reduction or increase, in workplace injuries.

14. During the relevant time period, if Respondent received any formal or informal complaints by any employee other than Charging Party concerning the test(s), or any claims of discrimination based on sex, disability and/or age, submit the following:

    a. name and job title of each person who complained,

    b. name and job title of each person receiving each complaint,

    c. date of each complaint,

    d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

    e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken.

15. Provide a list* of all individuals who applied for a position, for which the test identified in #5 and #6 above was in use, at any location or facility of Respondent during the relevant time period. Annotate the list by:

    a. name

    b. social security number

    c. last known home address and telephone number

    d. sex

    e. medical condition(s)

f. date of birth

g. date of application

h. whether the applicant was hired, and date and reason for hire or non-hire

i. location at which they applied and

j. position for which they applied.

16. Provide a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #5 and #6 above was in use, at any and [sic] location or facility of Respondent during the relevant time period. Annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of birth

g. date promotion sought

h. whether the individual seeking promotion was selected, and, if so, date and reason for selection or non-selection

i. location at which they sought promotion and

j. position for which they sought promotion.

17. Provide a list* of all individuals who were employed by Respondent at any location or facility nationwide during the relevant time period. Provide a separate list for each facility/location nationwide and annotate the list by:

    a. name

    b. social security number

    c. last known home address and telephone number

    d. sex

    e. medical condition(s)

    f. date of birth

    g. date of hire

    h. all position titles held

    i. dates when each position title was held

    j. termination date and reason, if applicable.

18. Provide a complete copy of Charging Party's personnel file, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by her, complaints made about her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination and Charging Party's medical file, including but not limited to test scores or results,

documentation from treating physicians, documentation from non-treating physicians, and medical or physical evaluations by Respondent's personnel.

19. Provide complete copies of the personnel files, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by him or her, complaints made about him or her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination for Bobby Carlson (President), Theresa Hatch (Human Resources Manager) and Janann Williams (Vice President, People).

* * *

[Doc. 2-1]

EXHIBIT 12

EEOC Form 136
(10/94)

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

SUBPOENA

TO: Grady Rosier, President/CEO NO: PHX-11-32
McLane Company
4747 McLane Parkway
Temple, TX 76504

IN THE MATTER OF: Ochoa v. McLane Sunwest

Charge No. 540-2008-01093

Having failed to comply with previous request(s) made by or on behalf of the undersigned Commission official, YOU ARE HEREBY REQUIRED AND DIRECTED TO:

☐ Testify before: ☐ Produce and bring * or
☒ Mail * the documents described below to:

☐ Produce access to the evidence described below for the purpose of examination or copying to:

Investigator Barbara Rusden of the Equal Employment Opportunity Commission

at 3300 N. Central Ave., Ste. 690, Phoenix, AZ 85012 on March 11, 2011 at 4:00 p.m. o'clock

The evidence required is

See Attachments A and B which are incorporated herein by reference.

cc: Bobby Carlson, McLane Sunwest
Ashley Kasarjian, Snell & Wilmer
Joshua Woodard, Snell & Wilmer

This subpoena is issued pursuant ☒ (Title VII) 42 U.S.C. 2000e-9 ☐ (ADEA) 29 U.S.C. 626(a) ☐ (EPA) 29 U.S.C. 209 ☒ (ADA) 42 U.S.C. 12117(a)

ISSUING OFFICIAL
(Typed name, title and address) ON BEHALF OF THE COMMISSION

[SEAL]

Rayford O. Irvin
District Director
330 N. Central Ave.,
Ste. 690
Phoenix, AZ 85012 /s/ Rayford O. Irvin FEB 15 2011
Date

*NOTICE TO PERSON SUBPOENAED—The Commission will not pay witness fees or travel expenses for the delivery of required documents to a Commission office unless the box "Testify before" is also checked on the subpoena.

[Subpoena Proof Of Service Omitted]

ATTACHMENT A TO PHX-11-32

If Respondent withholds any evidence or document in responding to this subpoena, Respondent is instructed to provide a detailed description of the evidence or document withheld and the specific basis upon which it is being withheld.

"Evidence" shall mean any information whether presently compiled in documentary form or capable of being compiled and which exists in any form, including but not limited to that information which may exist in the minds of supervisors or workers. See Equal Employment Opportunity Commission v. Maryland Cup Corp., 785 F.2d 471 (4th Cir. 1986)

"Documents" or "Documentary Form" shall mean and include all written, printed, typed, graphic material,

computer files or other tangible mediums of reproduction or communication, of every kind and description, however produced or reproduced, by whomever prepared, to whomever addressed, which are in possession, custody, or control of the person or entity to which this Subpoena is directed or to which such person or entity has, has had, or can obtain access. Further, the term "documents" includes any copies or documents which are not identical duplicates of the originals, including, but not limited to, all drafts of whatever date, copies with typed or handwritten notations, and copies of documents the originals of which are not in the possession, custody, or control of the person or entity to which the Subpoena is directed.

Date FEB 15 2011 /s/ Rayford O. Irvin

Rayford O. Irvin, District Director
Equal Employment
Opportunity Commission
330 N. Central Avenue, Suite 690
Phoenix, AZ 85012

ATTACHMENT B TO PHX-11-32

Respondent: McLane Company, Inc. (all facilities/ locations nationwide including corporate)

1. Documents which reflect the nature of Respondent's business, any and all trade names d/b/a's or former names. Also include documentation either already in existence or prepared by Respondent in

response to this request that describes or provides the following information:

a. the type of corporate or business entity

b. approximate number of employees during calendar years 2007 and 2008

c. location of corporate headquarters

d. current status of the corporation, i.e. active, inactive, or another status

e. the name of Respondent's corporate officers, directors, and owners

f. the statutory agent for Respondent in Arizona

g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

i. Provide the legal name and business address of all superior and subordinate business entities identified.

ii. Provide the statutory agent for all superior and subordinate business entities identified.

2. Documents which reflect liability insurance that will provide coverage for this charge.

3. Submit copies of any and all employee handbooks in effect from January 1, 2006 to the present and

a. provide documents which reflect in detail how this information is disseminated to employees, and

b. provide documents which reflect the date when any employee handbook went into effect, and the dates of any revisions.

4. Documents which reflect or a list identifying each test used by Respondent from January 1, 2006 to the present, including but not limited to Industrial Physical Capability Strength test (IPCS) and Isokinetic Physical Capability Test (IPCT), and provide documents which reflect any variations of each test in use.

a. for each test variation, provide documents which reflect or a list which identifies all jobs or job classifications for which it has been used.

b. list all alternative names used to describe or refer to each test and variation.

5. For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #4 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:

a. provide documents which reflect how the test was developed and how it is used by Respondent,

b. provide documents which reflect the name of each test's or variation's author or creator; the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

c. provide documents which describe the process that led to Respondent's implementation of each test or variation, including the names and titles of

all key decision makers involved in the process. Include copies of all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include copies of any and all documents reviewed by any key decision makers in addition to paragraph 6 below,

d. provide documents which reflect the effective dates of use of each test or variation at each of Respondent's locations,

e. provide documents which reflect any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for individual(s) who administer the test and individual(s) who take the test,

f. provide documents which reflect a description of how each test or variation is administered and scored. Include documents which reflect a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

g. provide documents which reflect or a list of all jobs and job classifications for which any test or variation is used;

h. for each job or job classification for which a test or variation is used, provide documents which identify the specific test or variation (listed in response to paragraph 5) used for that job or job classification,

i. for each job or job classification for which a test or variation is used, provide documents which identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide documents which reflect the details on the process by which any scoring/classification system was established, and provide documents which reflect the details about the process by which Respondent determined the minimum score considered "passing."

j. for each job or job classification for which a test or variation is used, provide copies of the job descriptions.

k. provide copies of any and all adverse impact studies performed for each test or variation.

6. Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #4 and #5 above, to include any notes or other documents concerning development and implementation of the test by Respondent.

7. For all positions at Respondent's facilities/ locations nationwide for which any test or variation identified in #4 and #5 above is used, provide a copy of the Job Task Analysis for each position. Include:

a. documents which reflect or a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and

b. any documents containing job analysis information for all positions wherein testing is applied to employees and/or new hires.

8. For January 1, 2006 to the present date, provide documents or a listing* of information identifying all persons who took any test or variation identified in #4 and #5 in connection with employment at any of Respondent's locations or facilities nationwide. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

---

* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

g. date of hire (or promotion), and job classification at hire (or promotion)

h. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

i. position held at the time test was administered (for individuals employed at the time or returning to work)

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

9 Provide documents which reflect or a list of all Respondent's facilities and locations in existence from January 1, 2006 to the present.

10. For all Respondent facilities/locations nationwide from January 1, 2006 to the present and with respect to any test or variation identified in #4 and #5 above, provide documents or a list* of information identifying all persons by name, last known home address and telephone number, and social security number, who were:

a. terminated because of an inability to pass any test or variation,

b. reassigned and/or transferred because of an inability to pass any test or variation,

c. not hired because of an inability to pass any test or variation,

d. not promoted because of an inability to pass any test or variation,

11. For each person identified in 11(a) through 11(d), provide documents which reflect:

a. date of termination, reassignment, transfer, not hired or not promoted,

b.. name and title of the individual who made the decision to terminate, reassign, transfer, not hire and/or not promote the person based on test results.

12. For each test or variation identified in #4 or #5, provide any and all documents evidencing any change, whether a reduction or increase, in workplace injuries.

13. From January 1, 2006 to the present, if Respondent received any formal or informal complaints by any employee other than Charging Party concerning the test(s), or any claims of discrimination based on sex and/or disability, submit documents evidencing the following:

a. name and job title of each person who complained,

b. name and job title of each person receiving each complaint,

c. date of each complaint,

d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken.

14. Provide documents or a list* of all individuals who applied for a position, for which the test identified in #4 and #5 above was in use, at any location or facility of Respondent during the relevant time period. Include:

a. name

b. social security number

c. last known home address and telephone number

d sex

e. medical condition(s)

f. date of application

g. whether the applicant was hired, and date and reason for hire or non-hire

---

* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

h. location at which they applied and

i. position for which they applied.

15. Provide documents or a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #4 and #5 above was in use, at any and [sic] location or facility of Respondent from January 1, 2006 to the present. Include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date promotion sought

g. whether the individual seeking promotion was selected, and, if so, date and reason for selection or non-selection

h. location at which they sought promotion and

i. position for which they sought promotion.

16. Provide documents or a list* of all individuals who were employed by Respondent at any location or

---

* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with

facility nationwide from January 1, 2006 to the present. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of hire

g. all position titles held

h. dates when each position title was held

i. termination date and reason, if applicable.

17. Provide complete copies of the personnel files, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by him or her, complaints made about him or her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination for Bobby Carlson (President), Theresa Hatch (Human Resources Manager) and Janann Williams (Vice President, People)

---

subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

18. List any and all alternatives to the ICPS [sic] or IPCT test that Respondent considered implementing in lieu of the ICPS [sic] or IPCT test. Include:

a. copies of all documents Respondent reviewed in considering any such alternatives.

b. copies of all documents relating to any findings, analyses, or determinations made by Respondent regarding any such alternatives.

[Certified Mail Receipt Omitted]

[Doc 2-1]

EXHIBIT 13

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
400 East Van Buren Street
Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000
602.382.6070 (Fax)
www.swlaw.com

DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

Ashley T. Kasarjian
602-382-6544
akasarjian@swlaw.com

February 22, 2011

VIA FAX: (602) 640-5071
AND HAND DELIVERY

Rayford O. Irvin
Equal Employment Opportunity Commission
District Director (Issuing Official)
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012

Re: **Petition to Revoke Subpoena**
No. PHX-11-32
Damiana Ochoa v. McLane Sunwest
Charge No.: 548-2008-01093

Dear Mr. Irvin:

Pursuant to 29 C.F.R. § 1601.16, Respondents McLane Company, Inc. ("McLane") and McLane/Suneast, Inc. ("McLane Sunwest")[1] hereby petition the EEOC to revoke Subpoena No. PHX-11-32, dated February 15, 2011 (the "Subpoena"), requesting documents and information relating to the matter of *Ochoa v. McLane Sunwest* (Charge No. 540-2008-01093). *See* EEOC Subpoena, Attach. A. Respondents submit this petition to request that the Subpoena be revoked in its entirety, as Respondents have already complied with all reasonable requests. In the alternative, Respondents request that the EEOC withdraw and/or modify the Subpoena,

---

[1] The EEOC issued the current Subpoena to McLane Company, Inc. However, the underlying Charge of Discrimination filed by Ms. Damiana Ochoa was filed solely against her employer, McLane Sunwest. Accordingly, both McLane Company, Inc. and McLane Sunwest petition the EEOC to revoke the Subpoena.

and engage in discussions as to the scope of information sought.

As noted in earlier correspondence and discussed more fully herein, Respondents have concerns with the breadth and scope of the Subpoena and information sought. Notwithstanding such concerns, Respondents have consistently expressed a willingness to cooperate with the EEOC and have made efforts to confer with EEOC officials at many levels. Respondents remain committed to engaging in such discussions and information sharing; however, the EEOC's issuance of the Subpoena necessitates this Petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Respondents McLane Company, Inc. and McLane Sunwest

McLane Company, Inc. is a supply chain services company, providing grocery supply chain solutions for convenience stores, mass merchants, drug stores, and military locations throughout the United States. In addition to having several discrete operating locations, McLane also has a number of completely separate subsidiary companies.

McLane/Suneast, Inc., d/b/a "McLane Sunwest" is a subsidiary of McLane that operates as a grocery distribution center in Goodyear, Arizona. Since opening in 1985, it has provided services to its customers located in Arizona, Nevada, New Mexico and Texas. McLane

Sunwest has been, and remains, committed to developing dedicated, well-trained teams that are focused on excellence. As an equal opportunity employer, McLane Sunwest prohibits unlawful discrimination in every aspect of the employment relationship. Further, McLane Sunwest is committed to protecting the safety and health of all its employees.

B. Ms. Ochoa's Charge of Discrimination

Ms. Damiana Ochoa ("Ms. Ochoa") filed a Charge of Discrimination against McLane Sunwest on January 7, 2008 alleging that she was discriminated against because of her sex (female) and alleged disability (pregnancy).[2] In her charge of sex and disability discrimination, Ms. Ochoa alleged as follows:

> On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (physical capability strength test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007, and December 28, 2007, I retested and did not pass. I have worked for the above-named employer for over eight years as a cigarette selector.

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[2] EEOC Investigator, Barbara Rusden, confirmed during the interview of Ms. Theresa Hatch that the EEOC was not alleging that Ms. Ochoa's pregnancy was a disability protected by the ADA.

> I believe I have been discriminated against because of my sex, female, (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> The physical capability strength test is given to all employees returning to work from medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended.

McLane Sunwest denies Ms. Ochoa's allegations in their entirety and provided the EEOC with evidence showing that she had not been discriminated against in any way. As explained in its position statement dated April 25, 2008, McLane Sunwest hired Ms. Ochoa as a Selector II/Mezzanine Selector. In this position, Ms. Ochoa was required to perform various physical tasks, such as: (1) pulling stacks of 25 empty totes to a staging area (which required up to 145 lbs. of force); (2) lifting totes off stacks and placing them on a roller belt; (3) pushing/pulling totes up or down the roller belt; (4) stocking shelves; and (5) lifting/lowering/carrying/sliding 40 lb. wooden pallets. All physically demanding positions at McLane Sunwest are assigned either the "Medium," "Medium-Heavy" or "Heavy" category based upon the physical demands of the job requirements, as assessed by an independent ergonomic expert. Ms. Ochoa's position required "Medium-Heavy" lifting and physical exertion.

McLane and its subsidiaries take the safety of their employees seriously. Specifically, with regard to

McLane Sunwest, in order to ensure that employees are capable of safely performing these physically demanding jobs, all newly hired employees, employees returning from an absence of thirty days or more, as well as individuals seeking a job that is more physically demanding than their current job, are required to take a physical capability exam known as the Industrial Physical Capability Strength Test (referred to as "PCE" or "IPCS test"). If an employee cannot meet the minimum strength requirement for the particular position, the employee may be given an opportunity to retest. During this time, the employee is encouraged to work to enhance their overall physical capability.

i. General Information Regarding IPCS Testing

Industrial Physical Capability Services, Inc. ("IPCS") oversees the testing in order to ensure objectivity, validity, and reliability. Over the past thirty years, IPCS has provided its standardized capability assessments to numerous industrial clients in the trucking, distribution, airline, manufacturing and utility industries. Numerous comparative studies have evaluated the effectiveness of IPCS testing on the reduction in the frequency and severity of injuries. For example, in a 16-month analysis of new employees who were evaluated by IPCS testing, there was a 70.5% reduction in the incident rate of injury. In another study, 14 food distribution locations took part in a 35-month study that concluded that there was a dramatic impact

on the reduction of the frequency and severity of injuries.

In order to match the physical capabilities of the worker to the physical demands of a particular job, a Job Task and Physical Activities Analysis is performed by an independent company that observes and analyzes the performance of the job duties. This analysis determines the target physical capability score required for each particular job. McLane Sunwest employees go to an approved clinic, with trained IPCS providers, to take the PCE. The PCE is performed on an isokinetic machine that focuses on the major muscle groups of the shoulders and legs, as strength in these two areas is necessary when performing the essential functions of these physically demanding jobs. The machine allows a dynamic evaluation of specific movement patterns and accommodates an individual's weaknesses and strengths by providing resistance equal to the force applied against the machine.

IPCS testing is critical at McLane Sunwest given the physically demanding nature of certain jobs. For example, a Selector II may pick approximately 2,300 pieces of product from racks to place in totes, filling 1,000 totes per shift.

ii. Ms. Ochoa's IPCS Testing

Ms. Ochoa requested and was granted FMLA leave for the birth of a child. Upon concluding her FMLA leave, she successfully completed the required "Return to Work" test and was promptly reinstated. In

June 2007, Ms. Ochoa again requested and was granted FMLA leave for the birth of another child. Following the expiration of her second leave, Ms. Ochoa did not meet the minimum physical strength capability to safely perform the essential functions of her medium-heavy position—despite being given three separate chances at the physical capability examination. As a result of her third failure, IPCS concluded that she was unable to meet the minimum qualifications to perform the essential functions of her job. Because no alternative position existed at or below her strength capability, her employment was terminated on January 9, 2008.

iii. McLane Sunwest's Response to Ms. Ochoa's Charge

McLane Sunwest denies Ms. Ochoa's allegations in their entirety and has provided the EEOC with evidence showing that she had not been discriminated against in any way. In response to Ms. Ochoa's Charge, McLane Sunwest submitted a position statement with 24 supporting exhibits on April 25, 2008. *See* Summary of Exhibits Produced, Attach. B. In addition, in response to the EEOC's first Request for Information ("First RFI"), McLane Sunwest submitted a supplemental response and supporting exhibits 25-64 on November 13, 2009. McLane Sunwest also permitted the EEOC to conduct an on-site visit of the McLane Sunwest facility, and agreed to the interview of Theresa Hatch, Human Resources Manager, on March 9, 2010,

and Janann Williams, Vice President, People, on August 5, 2010. As discussed in Section C below, McLane Sunwest also provided the EEOC with additional information and produced exhibits 65-75 (including various subparts) on January 14, 2011, in response to the EEOC request for information ("Second RFI").

Among the documents disclosed were policies and procedures related to the IPCS test, documents related to Ms. Ochoa's taking of the test and her IPCS test results, a breakdown of all IPCS test results from McLane Sunwest and related data regarding the employees taking the test, the job task analysis for Ms. Ochoa's position and for other positions at McLane Sunwest and within grocery operations, the documentation employees receive regarding the IPCS testing, physical demands and strength definitions, a validation study and injury analyses prepared by IPCS, opinion letters regarding the validity of the IPCS test, Ms. Ochoa's entire personnel file, and documents explaining the IPCS test.

C. The EEOC's Expansion of Ms. Ochoa's Charge

Notwithstanding the voluminous documents and data produced relating to Ms. Ochoa's claim, the EEOC has continued to request more information and documents. First, to avoid the statutory limit to its ability to investigate Ms. Ochoa's Charge under Title VII, the EEOC simply added an additional charge number to its request for information relating to Ms. Ochoa's

charge and now claims to be investigating nationwide ADEA compliance. In doing so, the EEOC argues that the nationwide scope of its subpoena relating to Ms. Ochoa's Charge is justified. Thus, without an actual Charge of Discrimination, Charging Party, or Commissioner's Charge, the Phoenix office of the EEOC expanded the Ochoa sex and disability investigation into an ADEA investigation of McLane Company, encompassing all related entities nationwide. Notably, Ms. Ochoa was not 40 years old or older at the time of her employment with Sunwest, and would not have been afforded the protections of the Age Discrimination in Employment Act, as amended by the Older Workers Benefits Protection Act.

Moreover, although asked, Investigator Rusden stated that the EEOC was not willing to explain the basis for this EEOC-initiated investigation or why it is warranted or justified. While the request for age-related data was removed from the request regarding Ms. Ochoa's Charge—it remains on the "separate" ADEA Charge—and the EEOC has continued to assert that it is expanding the scope of its investigation of Ms. Ochoa's Charge nationwide, despite the fact that the Company is comprised of operationally-distinct divisions.

In a letter dated September 3, 2010, McLane made clear that it was willing to cooperate with any reasonable investigation conducted by the EEOC, but pointed out that the EEOC never provided McLane a copy of the purported new charge or any other notice of

the purported ADEA allegations warranting an expanded "nationwide investigation" of ADEA compliance. McLane explained that it could not begin to analyze the EEOC's extensive request for information without such notice. McLane also raised concerns with the intermingling of this purported new ADEA charge and Ms. Ochoa's charge and the suspicious timing of the request, following objections to the investigation exceeding the scope authorized by Title VII. McLane asked the EEOC for some explanation of the basis for investigating ADEA compliance, including requesting a copy of the Charge referenced. McLane also expressed its willingness to cooperate and requested clarification as to the EEOC's significant request by correspondence dated December 7, 2010, telephonically during a conversation with EEOC Investigator Barbara Rusden on January 12, 2011, and again, on January 19, 2011.

At the same time the EEOC initiated the ADEA investigation, the agency sent identical requests for information requesting nationwide information from all facilities and subsidiaries of McLane relating to claims of gender and disability discrimination. Ms. Rusden subsequently apologized for intermingling the two requests, and then, sent two nearly identical requests to Respondents. Accordingly, McLane Sunwest responded to the EEOC's amended Second RFI and provided additional documentation relating to McLane Sunwest and the grocery division. *See* Attach. B. McLane Sunwest further objected to any further expansion of nationwide data, as any requests for information relating

to the food division would not be relevant to Ms. Ochoa's employment or allegations and could not have arisen from Ms. Ochoa's Charge.

Of significance, the employees in the food division are not similarly situated to the employees in the grocery division. In addition to the fact that the separate McLane facilities are independent centers, the food service division and grocery division are entirely distinct companies operationally. As Ms. Janann Williams explained during her August 5, 2010 interview, the decision to use the IPCS test in the grocery division was made independently of the decision to use the IPCS test in the food service division. Ms. Williams further noted that each division had its own Job Task Analyses prepared. Accordingly, the prior actions of the food service division are not the subject of or related to Ms. Ochoa's Charge. Ms. Ochoa was never employed in a food service distribution center, and none of her allegations relate to the food service distribution centers. The EEOC's request, seeking information and documentation from distinct companies, distinct operations, and distinct divisions of McLane Company, Inc. could not fairly or accurately be argued to have arisen from the EEOC's investigation of Ms. Ochoa's Charge.

Throughout its investigation, the EEOC has sought information beyond what is relevant to Ms. Ochoa's allegations. Although Ms. Ochoa alleged only gender and disability discrimination relating to her attempt to return to work at McLane Sunwest, the

EEOC sought broad nationwide, company-wide information regarding all facilities, business divisions, and related entities far beyond Ms. Ochoa's allegations.

D. Respondents' Proposed Less Burdensome Alternative Production

McLane Sunwest has cooperated with the EEOC and its investigation of Ms. Ochoa's Charge, and is willing to continue complying with the agency's requests for information, to the extent they are reasonable and within the agency's statutory authority. Moreover, as reiterated on multiple occasions, Respondents have been and remain willing to provide information to allow the EEOC to analyze the validity of the IPCS test in order to avoid the burden and expense of production of the vast amount of information sought on a nationwide basis.

Of significance, McLane Sunwest has already produced 75 exhibits, many with subparts, in response to Ms. Ochoa's Charge and the EEOC's requests for information. Included in its production, McLane Sunwest has provided specific data regarding the IPCS testing at its location. In particular, the EEOC was provided with an excel file containing the employees' gender, test date, test reason, job class, job target, whether the employee met the minimum requirements of the position he or she was testing for, and the level he or she met.

Respondents object to the current requests for information and documents as they would be unduly

burdensome to produce, are not relevant to the EEOC's investigation of Ms. Ochoa's Charge, and accordingly, are beyond the EEOC's statutory authority. However, Respondents are more than willing to discuss additional suggestions to stage document/information production to allow for a streamlined and less burdensome collection and production in order that the EEOC may evaluate the validity of the IPCS test—which may negate the need for further expense and investigation.

II. GENERAL OBJECTIONS

As a preliminary matter, Respondents object to the expansion of the investigation outside the scope of the underlying Charge into a division of the Company which Charging Party was not even employed. An investigation into all McLane locations is overly broad, unduly burdensome, and seeks information that is not relevant to the underlying Charge of Discrimination.

Further, the EEOC issued an almost identical subpoena relating to the ADEA investigation. *See* Subpoena No. PHX-11-33, Attach. C.[3] As discussed in

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[3] The only issue for consideration as to this petition is the expansion of Ms. Ochoa's Charge, as the Subpoena issued relating to the ADEA investigation has been addressed in separate correspondence by Morgan, Lewis & Bockius LLP, on behalf of McLane Company, Inc. However, the ADEA Subpoena is offered as an attachment to this petition due to the Respondents' concerns regarding the intermingling of the investigations. Notably, "[t]he scope of the judicial inquiry in an EEOC or any other agency subpoena enforcement proceeding is quite narrow. The critical questions are: (1) whether Congress has granted the authority to

McLane's correspondence dated September 3, 2010 and January 14, 2011, Respondents are concerned with the intermingling and timing of the requests for information in Ms. Ochoa's matter and the new Commissioner's Charge regarding the Age Discrimination in Employment Act, in addition to their burdensome nature. Of significance, the expansive requests for information were nearly identical (even after their revision), and were even initially identified as if the Charges were one-and-the-same, despite Ms. Ochoa not being over 40 years old at the time of her employment.

Further, Respondents object to the Subpoena as seeking irrelevant information, exceeding the EEOC's investigative authority and constituting an abuse of process. The requests are objectionable for several reasons, including that they: (1) require Respondents to produce or create information, electronic or otherwise, in a medium or format other than that in which it is

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investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." *E.E.O.C. v. Fed. Express Corp.*, 558 F.3d 842, 848 (9th Cir. 2009). The EEOC is only entitled to inspect and copy evidence that is relevant to the charge under investigation. *Id.* at 849 (citing *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 63 (1984) (quoting 42 U.S.C. § 2000e-8(a)); *see also University of Penn. v. E.E.O.C.*, 493 U.S. 182, 194 (1990) ("[U]nless specifically provided otherwise in the statute, the EEOC may obtain 'relevant' evidence."). "[T]he EEOC's investigative authority is tied to charges filed with the Commission; unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled access only to evidence 'relevant to the charge under investigation.'" *Shell Oil*, 466 U.S. at 64.

maintained in the normal course of business, and therefore are unduly burdensome; (2) require production and indexing of extensive electronically stored information, the collection and production of which would seriously disrupt Respondents' normal business operations and cause significant monetary expense to Respondents that would outweigh the probative value of such information, and therefore are unduly burdensome; (3) seek information and/or documents that are not relevant to the Charge under investigation or any aspect of any [sic] Ms. Ochoa's employment with McLane Sunwest and/or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related thereto the allegations in the Charge; (4) seek information concerning employment policies, practices, or decisions other than those at issue in the Charge, and therefore are not reasonably calculated to lead to the discovery of admissible evidence; (5) are not properly limited in time and seek documents beyond any statute of limitations applicable to the Charge, and therefore are not reasonably calculated to lead to the discovery of admissible evidence; (6) require Respondents to provide information and/or documents about employees nationwide at independent facilities owned and/or operated by McLane; (7) require documents to be provided that are not within the possession, custody or control of Respondents; and (8) require the Respondents to provide information and/or documents, including proprietary and confidential information, concerning McLane Sunwest and/or other the [sic] divisions of

McLane and their employees, policies, practices, or decisions other than those at issue in the Charge.

Generally, Respondents object to the Subpoena as requesting information that is irrelevant and unlikely to lead to relevant information, overly broad, unduly burdensome, and issued solely to harass Respondents. The Subpoena would require manual person-by-person analysis and data compilation on thousands of employees nationwide, significantly disrupting Respondents' business operations. Although Respondents address the specific requests in the response below, Respondents respectfully request that the company-wide Subpoena be revoked in its entirety. Alternatively, Respondents request that the EEOC consider alternative approaches to the production of information that could eliminate the EEOC's concerns through less burdensome means.

III. SPECIFIC OBJECTIONS TO THE EEOC'S REQUESTS

Request 1: **Documents which reflect the nature of Respondent's business, and any and all trade names, d/b/a's or former names. Also include documentation either already in existence or prepared by Respondent in response to this request that describes or provides the following information:**

a. **the type of corporate or business entity**

b. **approximate number of employees during calendar years 2007 and 2008**

c. location of corporate headquarters

d. current status of the corporation, i.e. active, inactive, or another status

e. the name of Respondent's corporate officers, directors, and owners

f. the statutory agent for Respondent in Arizona

g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

i. Provide the legal name and business address of all superior and subordinate business entities identified.

ii. Provide the statutory agent for all superior and subordinate business entities identified.

Response: McLane Sunwest has already produced its information in response to the EEOC's previous request. As Ms. Ochoa's Charge against McLane Sunwest is the only actual charge, the information provided should be sufficient. Respondents object to this request as seeking irrelevant information, overly broad and unnecessary to any legitimate investigation conducted by the EEOC. The address for McLane Company, Inc. is P.O. Box 6115, Temple, Texas, 76503. Its statutory agent is CT Corporation.

***Request 2*: Documents which reflect liability insurance that will provide coverage for this charge.**

***Response*:** Respondents object to this request as liability insurance is irrelevant to any legitimate investigation the EEOC could be conducting. The fact that the EEOC seeks information regarding liability insurance suggests that the EEOC is posturing for litigation prior to any investigation or conciliation efforts.

***Request 3*: Submit copies of any and all employee handbooks in effect from January 1, 2006 to the present and**

a. provide documents which reflect in detail how this information is disseminated to employees, and

b. provide documents which reflect the date when any employee handbook went into effect, and the dates of any revisions.

***Response*:** In its January 14, 2011 correspondence, McLane Sunwest produced the provisions of the grocery division handbook relevant to Ms. Ochoa's Charge. As Exhibits 65(A)-(E) through 69(A)-(E), McLane Sunwest provided the following policies: (1) Equal Employment Opportunity; (2) Harassment/ Sexual Harassment/Investigating and Resolving Complaints; (3) Safety;(4) Leave of Absence; and (5) Communication and Conduct. Accordingly, Respondents object to this request as irrelevant, overly broad,

unduly burdensome and seeking solely to harass Respondents. Respondents object to this request as seeking confidential information. Seeking handbooks in their entirety company-wide constitutes a fishing expedition. Respondents further object to the temporal scope and the lack of geographic scope.

***Request 4*: Documents which reflect or a list identifying each test used by Respondent from January 1, 2006 to the present, including but not limited to Industrial Physical Capability Strength test (IPCS) and Isokinetic Physical Capability Test (IPCT), and provide documents which reflect any variations of each test in use**

a. **for each test variation, provide documents which reflect or a list which identifies all jobs or job classifications for which it has been used,**

b. **list all alternative names used to describe or refer to each test and variation.**

***Response*:** Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane Sunwest produced detailed information regarding the IPCS test in its position statement, dated April 25, 2008, the response to the First RFI, dated November 13, 2009, and its response to the Second RFI, dated January 14, 2011, as well as at the interviews of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010.

Respondents further object to this request as seeking confidential information and because certain terms used therein are vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test. Should additional information be needed, Respondents suggest a staged and less burdensome process to facilitate the EEOC's investigation.

***Request 5*: For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #4 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:**

a. **provide documents which reflect how the test was developed and how it is used by Respondent,**

b. **provide documents which reflect the name of each test's or variation's author or creator; the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,**

c. **provide documents which describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the process. Include copies of all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include copies of any and all documents reviewed by any key decision makers in addition to paragraph 6 below,**

d. **provide documents which reflect the effective dates of use of each test or variation at each of Respondent's locations,**

e. **provide documents which reflect any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for individual(s) who administer the test and individual(s) who take the test,**

f. **provide documents which reflect a description of how each test or variation is administered and scored. Include documents which reflect a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended**

leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

g. **provide documents which reflect or a list of all jobs and job classifications for which any test or variation is used;**

h. **for each job or job classification for which a test or variation is used, provide documents which identify the specific test or variation (listed in response to paragraph 5) used for that job or job classification,**

i. **for each job or job classification for which a test or variation is used, provide documents which identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide documents which reflect the details on the process by which any scoring/classification system was established, and provide documents which reflect the details about the process by which Respondent determined the minimum score considered "passing."**

j. **for each job or job classification for which a test or variation is used, provide copies of the job descriptions.**

k. provide copies of any and all adverse impact studies performed for each test or variation.

***Response*:** McLane Sunwest produced detailed information regarding the IPCS test in its position statement, dated April 25, 2008, the response to the First RFI, dated November 13, 2009, and the response to the Second RFI, dated January 14, 2011, as well as at the interviews of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010.

Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. Respondents further object to this request as seeking confidential information, and object as certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC. Further, Respondents object to this request as it is unduly burdensome and would require each company, subsidiaries and/or operating location of McLane to produce and/or create extensive information and documentation including but not limited to the use, development, origination, implementation, scoring, and administration of tests at each facility.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

Request 6. **Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #4 and #5 above, to include any notes or other documents concerning development and implementation of the test by Respondent.**

Response: McLane Sunwest produced the validation study provided by Vedder Price P.C., dated January 14, 2005, as Exhibit 15 to the position statement submitted on April 25, 2008. Additionally, McLane Sunwest produced the validation studies provided by Vedder Price P.C., dated April 21, 2008 and August 23, 2002, as Exhibits 30 and 31 to the First RFI, dated November 13, 2009.

Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. Respondents further object to this request as seeking confidential information, and object as [sic] certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC. Further, Respondents object to this request as it is unduly burdensome and would require each company, subsidiaries and/or operating location of McLane to produce and/or create extensive information and documentation including but not limited to the use, development, origination, implementation, scoring, and administration of tests at each facility.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

***Request* 7. For all positions at Respondent's facilities/locations nationwide for which any test or variation identified in #4 and #5 above is used, provide a copy of the Job Task Analysis for each position. Include**

a. **documents which reflect or a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and**

b. **any documents containing job analysis information for all positions wherein testing is applied to employees and/or new hires.**

***Response*:** McLane Sunwest has already produced all Job Task Analyses for McLane Sunwest, as well as additional Job Task Analyses relating to grocery operations. *See* Exhibits 7, 41-54, 70-75.

Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

Request 8. **For January 1, 2006 to the present date, provide documents or a listing* of information identifying all persons who took any test or variation identified in #4 and #5 in connection with employment at any of Respondent's locations or facilities nationwide. The documents or list should be separated for each facility/location nationwide and include:**

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. medical condition

f. date of application

g. date of hire (or promotion), and job classification at hire (or promotion)

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the, field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

h. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

i. position held at the time test was administered (for individuals employed at the time or returning to work)

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

***Response*:** McLane Sunwest has already produced information relating to the IPCS testing at its facility. *See* Ex. 39. Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's reference to the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process

by the EEOC. This nationwide data is unnecessary for validating the IPCS test.

Respondents further object to this request as it would require Respondents to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Respondents' normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees and is not actively tracked and/or maintained by Respondents. It would be unduly burdensome for Respondents to produce the requested information as it would require Respondents to categorize, classify and identify information regarding its employees on a person-by-person basis.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

Request 9. **Provide documents which reflect or a list of all Respondent's facilities and locations in existence from January 1, 2006 to the present.**

Response: McLane Sunwest provided the EEOC with the list of all of McLane's grocery facilities in its correspondence dated January 14, 2011. To the extent this request seeks information regarding any other locations, Respondents object to this request as irrelevant, overly broad, and seeking solely to harass Respondents. Respondents object to this request and certain terms used therein as vague and ambiguous. McLane has already indicated that it is willing to confer with the EEOC and provide documentation as to the location of its operations.

Request 10. **For all Respondent facilities/ locations nationwide from January 1, 2006 to the present and with respect to any test or variation identified in #4 and #5 above, provide documents or a list of information identifying all persons by name, last known home address and telephone number, and social security number, who were:**

a. **terminated because of an inability to pass any test or variation,**

b. **reassigned and/or transferred because of an inability to pass any test or variation,**

c. **not hired because of an inability to pass any test or variation,**

d. **not promoted because of an inability to pass any test or variation.**

Response: Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further

object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC' s use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

Respondents further object to this request as it would require Respondents to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt Respondents' normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees and is not actively tracked and/or maintained by Respondents. It would be unduly burdensome for Respondents to produce the requested information as it would require Respondents to categorize, classify and identify information regarding its employees on a person-by-person basis.

McLane Sunwest has already provide [sic] information to allow the EEOC to analyze the validity of the IPCS test. Respondents are willing to work with

the EEOC to provide any other reasonable information needed.

Request 11. **For each person identified in 11(a) through 11(d) [sic], provide documents which reflect:**

a. **date of termination, reassignment, transfer, not hired or not promoted,**

b. **name and title of the individual who made the decision to terminate, reassign, transfer, not hire and/or not promote the person based on test results.**

Response: Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

Respondents further object to this request as it would require Respondents to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt Respondents' normal business operations and cause significant monetary expense to Respondents that would

outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees and is not actively tracked and/or maintained by Respondents. It would be unduly burdensome for Respondents to produce the requested information as it would require Respondents to categorize, classify and identify information regarding its employees on a person-by-person basis.

McLane Sunwest has already provide [sic] information to allow the EEOC to analyze the validity of the IPCS test, and Respondents are willing to work with the EEOC to provide any other reasonable information needed.

***Request 12*: For each test or variation identified in #4 or #5, provide any and all documents evidencing any change, whether a reduction or increase, in workplace injuries.**

***Response*:** Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing

as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test. McLane is in the process of compiling and analyzing certain data relating to this request and Respondents are willing to confer with the EEOC as to an appropriate scope of production relating thereto.

Request 13. **From January 1, 2006 to the present, if Respondent received any formal or informal complaints by any employee other than Charging Party concerning the test(s), or any claims of discrimination based on sex and/or disability, submit documents evidencing the following;**

a. **name and job title of each person who complained,**

b. **name and job title of each person receiving each complaint,**

c. **date of each complaint,**

d. **any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,**

e. **record of all actions taken by your organization in response to each**

f. **complaint, including copies of all remedial actions taken.**

Response: McLane Sunwest produced on January 14, 2011 a list of complaints that were received from employees in the grocery division alleging discrimination based on the use of the IPCS test. Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the terms "complaints" and "test." Respondents object to this unlimited request for any and all testing and any complaint—formal or informal and regardless of the complaint—as a fishing expedition constituting an abuse of process by the EEOC. Without knowing the scope of the EEOC's investigation or any reasonable basis therefore, Respondents cannot reasonably respond to this request.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

Request 14. **Provide documents or a list* of all individuals who applied for a position, for which the test identified in #4 and #5 above was in use, at any location or facility of Respondent during the relevant time period. Include:**

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

g. whether the applicant was hired, and date and reason for hire or non-hire

h. location at which they applied and

i. position for which they applied.

***Response*:** Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC' s use of the terms "relevant time period" and "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

Respondents further object to this request as it would require Respondents to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Respondents' normal business operations and cause significant monetary expense to Respondents that would

outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees and is not actively tracked and/or maintained by Respondents. It would be unduly burdensome for Respondents to produce the requested information as it would require Respondents to categorize, classify and identify information regarding its employees on a person-by-person basis.

Request 15. **Provide documents or a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #4 and #5 above was in use, at any and** [sic] **location or facility of Respondent from January 1, 2006 to the present. Include:**

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date promotion sought

g. whether the individual seeking promotion was selected, and, if so, date and reason for selection or nonselection

h. location at which they sought promotion and

i. position for which they sought promotion,

Response: Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

Respondents further object to this request as it would require Respondents to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt Respondents' normal business operations and cause significant monetary expense to Respondents that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees and is not actively tracked

and/or maintained by Respondents. It would be unduly burdensome for Respondents to produce the requested information as it would require Respondents to categorize, classify and identify information regarding its employees on a person-by-person basis.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

Request 16. **Provide documents or a list* of all individuals who were employed by Respondent at any location or facility nationwide from January 1, 2006 to the present. The documents or list should be separated for each facility/location nationwide and include:**

a. **name**

b. **social security number**

c. **last known home address and telephone number**

d. **sex**

e. **medical condition(s)**

f. **date of hire**

g. **all position titles held**

h. **dates when each position title was held**

i. **termination date and reason, if applicable.**

Response: Respondents object to this request as irrelevant, overly broad, unduly burdensome, and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous. Respondents object to this unlimited request for employment information for all of its employees nationwide and the reasons for any of their terminations as a fishing expedition constituting an abuse of process by the EEOC.

Respondents further object to this request as it would require Respondents to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt Respondents' normal business operations and cause significant monetary expense to Respondents that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees and is not actively tracked and/or maintained by Respondents. It would be unduly burdensome for Respondents to produce the requested information as it would require Respondents to categorize, classify and identify information regarding its employees on a person-by-person basis.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

***Request 17*: Provide complete copies of the personnel files, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by him or her, complaints made about him or her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination for Bobby Carlson (President), Theresa Hatch (Human Resources Manager) and Janann Williams (Vice President, People).**

***Response*:** Respondents object to the request for the personnel files of Bobby Carlson, Theresa Hatch, and Janann Williams on the grounds that it seeks information and/or documents that are not relevant to the Charge under investigation nor any aspect of any Charging Party's current or former employment with the company, and therefore are not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related thereto the allegations in the Charge filed with the EEOC. Further, the production of Mr. Carlson's, Ms. Hatch's, and Ms. Williams' personnel files would require the Company to produce confidential information and/or documents concerning McLane Sunwest's employees.

Request 18. **List any and all alternatives to the ICPS** [sic] **or IPCT test that Respondent considered implementing in lieu of the ICPS** [sic] **or IPCT test. Include:**

a. **copies of all documents Respondent reviewed in considering any such alternatives.**

b. **copies of all documents relating to any findings, analyses, or determinations made by Respondent regarding any such alternatives.**

Response: Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing mechanisms considered as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Subpoena be revoked in its entirety or withdrawn and modified to avoid the

burdensome and expensive production of the vast amount of information sought on a nationwide basis. As illustrated by McLane Sunwest's previous responses to the EEOC's requests for information, Respondents are committed to working with the EEOC to provide relevant information and to further produce information in a less burdensome procedure.

The scope of the current Subpoena, however, is simply too broad and burdensome—particularly given that the EEOC has not analyzed the validity of the test which could render moot the need for much of the information sought in the Subpoena.

Sincerely,

SNELL & WILMER

/s/ Ashley Kasarjian
Joshua R. Wood[ ]ard
Ashley T. Kasarjian

MORGAN, LEWIS &
BOCKIUS L.L.P.

/s/ Ellen Perlioni/
with permission
Ronald E. Manthey
Ellen L. Perlioni

cc: Barbara Rusden
EEOC, Investigator
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012
Barbara.Rusden@EEOC.gov

[Attachment A Omitted Here
And May Be Found At JA 92-106.]

ATTACHMENT B

Ochoa v. McLane Sunwest— Documents Produced to EEOC

Ex. No.	Description	Disclosed through
1	Charge of discrimination filed by Damiana Ochoa, dated January 7, 2008 (Ex. 1 to Position Statement)	Pos. Stmt., 4/25/08
2	EEO Policy (Ex. 2 to Position Statement)	Pos. Stmt., 4/25/08
3	EEO Handbook Provision (Ex. 3 to Position Statement)	Pos. Stmt., 4/25/08
4	Safety Program (Ex. 4 to Position Statement)	Pos. Stmt., 4/25/08
5	Signed receipt of handbook (Ex. 5 to Position Statement)	Pos. Stmt., 4/25/08
6	Damiana Ochoa's employment application (Ex. 6 to Position Statement)	Pos. Stmt., 4/25/08

7	GMSI Job Task Analysis re Selector Mezzanine Selector (Ex. 7 to Position Statement)	Pos. Stmt., 4/25/08
8	Job categories with lifting specifications (Ex. 8 to Position Statement)	Pos. Stmt., 4/25/08
9	Physical demands strength definitions (Ex. 9 to Position Statement)	Pos. Stmt., 4/25/08
10	FMLA request granted to Damiana Ochoa (Ex. 10 to Position Statement)	Pos. Stmt., 4/25/08
11	FMLA policy (Ex. 11 to Position Statement)	Pos. Stmt., 4/25/08
12	Pre/Post employment physical requirements policy (Ex. 12 to Position Statement)	Pos. Stmt., 4/25/08
13	Notice to all applicants for employment (Ex. 13 to Position Statement)	Pos. Stmt., 4/25/08
14	Physical capability services manual (Ex. 14 to Position Statement)	Pos. Stmt., 4/25/08

15	T. Abram Ltr., dated January 14, 2005 (Ex. 15 to Position Statement)	Pos. Stmt., 4/25/08
16	Sample job task analysis report (Ex. 16 to Position Statement)	Pos. Stmt., 4/25/08
17	Sample results—IPCS (Ex. 17 to Position Statement)	Pos. Stmt., 4/25/08
18	Safety intervention for wrist and forearm pain (Ex. 18 to Position Statement)	Pos. Stmt., 4/25/08
19	Injury statement (Ex. 19 to Position Statement)	Pos. Stmt., 4/25/08
20	Accident/incident investigation report (Ex. 20 to Position Statement)	Pos. Stmt., 4/25/08
21	IPCS results, dated November 11, 2007 (Ex. 21 to Position Statement)	Pos. Stmt., 4/25/08
22	IPCS results, dated November 19, 2007 (Ex. 22 to Position Statement)	Pos. Stmt., 4/25/08
23	IPCS results, dated December 27, 2007 (Ex. 23 to Position Statement)	Pos. Stmt., 4/25/08

24	Termination document, dated January 9, 2008 (Ex. 24 to Position Statement)	Pos. Stmt., 4/25/08
25	Chart re IPCS rating and job task analyses (Ex. 25 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
26	Information re "The IPCS Score—What Is It?" (Ex. 26 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
27	Physical Capability Evaluation Proposal Presented to Company (Ex. 27 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
28	The Effectiveness of the IPCS Physical Capability Evaluation Process for McLane Food Service Company A Validation Study by Thomas B. Gilliam (Ex. 28 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

29	Injury Analysis to Determine the Effectiveness of the IPCS (Ex. 29 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
30	T. Abram Ltr., dated April 21, 2008 (Ex. 30 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
31	T. Abram Ltr., dated August 23, 2002 (Ex. 31 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
32	A 24-Month Injury Analysis Comparing the New Hire IPCS Isokinetic Evaluation to the Previous 24-Months New Hire Applicants for a Clothing Retail DSC—A Pilot Program—Executive Summary (Ex. 32 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

33	A Four-Year Injury Analysis to Determine the Effectiveness of the IPCS Physical Capability Evaluation Program on Reducing Exertion Injuries For a Large Food Manufacturer (Ex. 33 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
34	A 35-Month Injury Analysis Comparing the IPCS Isokinetic Evaluation to a Functional Capacity/Cardiovascular Evaluation on Reducing Injuries For Large Food Distribution Company—Executive Summary (Ex. 34 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
35	Comparing the IPCS Isokinetic Evaluation to Individuals Not T sted for a Major L-T-L Trucking Company—Executive Summary (Ex. 35 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

36	A Two Year Injury Analysis To Determine the Effectiveness of the IPCS Physical Capability Evaluation Program on Reducing Injuries for: The World's Largest Food Producer (Ex. 36 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
37	A 19-Month Injury Analysis Comparing the IPCS Isokinetic Evaluation to a Functional Capacity/Cardiovascular Evaluation on Reducing Injuries For a National Food Distribution Company—Executive Summary (Ex. 37 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request,11/13/09
38	A Comprehensive Analysis and Case Study for A Large US Logistics Trucking Company Showing Injury Rates and Injury Costs Comparing IPCS Tested Employees to Employees Not Tested Over a 3-year Period (Ex. 38 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

39	Data re Employees re Testing, Job Class and Level Achieved (Ex. 39 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
40	Chart detailing positions (Ex. 40 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
41	GMSI Job Task Analysis re Damages & Returns (Ex. 41 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
42	GMSI Job Task Analysis re Mezzanine Selector (Ex. 42 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
42A	GMSI Job Task Analysis re Cigarette Selector (Ex. 42A to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

42B	GMSI Job Task Analysis re Cigarette Stamper (Ex. 42B to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
42C	GMSI Job Task Analysi re GMP Selector (Ex. 42C to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
42D	GMSI Job Task Analysis re Candy Repack (Ex. 42D to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
42E	GMSI Job Task Analysis re Single Cell Grocery (Ex. 42E to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
43	GMSI Job Task Analysis re Sanitation (Ex. 43 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

44	GMSI Job Task Analysis re Hand Stamper (Ex. 44 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp, to EEOC request, 11/13/09
45	GMSI Job Task Analysis re Merchandiser (Ex. 45 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
46	GMSI Job Task Analysis re Yard Spotter (Ex. 46 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
47	GMSI Job Task Analysis re Forklift Replenishment (Ex. 47 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
48	GMSI Job Task Analysis re Delivery Driver (Ex. 48 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

49	GMSI Job Task Analysis re Full Case Selector (dry goods) (Ex. 49 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
50	GMSI Job Task Analysis re Full Case Loader (Ex. 50 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
51	GMSI Job Task Analysis re Stocker (Ex. 51 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
52	GMSI Job Task Analysis re Maintenance-DC Mechanic (Ex. 52 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
53	GMSI Job Task Analysis re Mechanic (Ex. 53 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

54	GMSI Job Task Analysis re Inventory Control (Ex. 54 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
55	Damiana Ochoa Employee File (Ex. 55 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
56	Industrial Physical Capability Services, Inc. for McLane Grocery Division (Ex. 56 to response to EEOC request, Ltr, from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
57	Article re "Move It. Lose it. Love Healthy. Achieve a Healthier Workplace One Employee at a Time!" by Thomas Gilliam and Jane Neill (Ex. 57 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
58	IPCS Advisement Letter (Ex. 58 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

59	IPCS Return to Work Letter (Ex. 59 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
60	Pre-employment Functional Capabilities Evaluation (Ex. 60 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
61	Physical Capability Strength Test: One Component of the New Hire Selection Process (Ex. 61 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
62	IPCS Physical Capability Strength Test (Ex. 62 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
63	Guidelines for Physical Capability Assessment (Ex. 63 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

64	Industrial Physical Capability Services, Inc. Applicant Information Page (Ex. 64 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
65A	Equal Employment Opportunity Policy, dated July 2005 (Ex. 65A to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11[1]
65B	Equal Employment Opportunity Policy, dated September 2008 (Ex. 65B to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
65C	Equal Employment Opportunity Policy, dated January 2010 (Ex. 65C to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

[1] The EEOC's second request was withdrawn by the EEOC and replaced by the request dated November 9, 2010.

65D	Equal Employment Opportunity Policy, dated February 2010 (Ex. 65D to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
65E	Equal Employment Opportunity Policy, dated September 2010 (Ex. 65E to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
66A	Harassment/Sexual Harassment/Investigating and Resolving Complaints Policy, dated July 2005 (Ex. 66A to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
66B	Harassment/Sexual Harassment/Investigating and Resolving Complaints Policy, dated September 2008 (Ex. 66B to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

66C	Harassment/Sexual Harassment/Investigating and Resolving Complaints Policy, dated January 2010 (Ex. 66C to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
66D	Harassment/Sexual Harassment/Investigating and Resolving Complaints Policy, dated February 2010 (Ex. 66D to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
66E	Harassment/Sexual Harassment/Investigating and Resolving Complaints Policy, dated September 2010 (Ex. 66E to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
67A	Safety Policy, dated July 2005 (Ex. 67A to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

67B	Safety Policy, dated September 2008 (Ex. 67B to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
67C	Safety Policy, dated January 2010 (Ex. 67C to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
67D	Safety Policy, dated February 2010 (Ex. 67D to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
67E	Safety Policy, dated September 2010 (Ex. 67E to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
68A	Leave of Absence Policy, dated July 2005 (Ex. 68A to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

68B	Leave of Absence Policy, dated September 2008 (Ex. 68B to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
68C	Leave of Absence Policy, dated February 2009 (Ex. 68C to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
68D	Leave of Absence Policy, dated January 2010 (Ex. 68D to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
68E	Leave of Absence Policy, dated February 2010 (Ex. 68E to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
68F	Leave of Absence Policy, dated September 2010 (Ex. 68F to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/1

69A	Communication and Conduct Policy, dated July 2005 (Ex. 69A to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
69B	Communication and Conduct Policy, dated September 2008 (Ex. 69B to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
69C	Communication and Conduct Policy, dated July 2009 (Ex. 69C to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
69D	Communication and Conduct Policy, dated January 2010 (Ex. 69D to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
69E	Communication and Conduct Policy, dated February 2010 (Ex. 69E to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

69F	Communication and Conduct Policy, dated September 2010 (Ex. 69F to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
70	GMSI Job Task Analysis re Checker (Ex. 70 to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
71	GMSI Job Task Analysis re Forklift Dock Hauler (Ex. 71 to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
72	GMSI Job Task Analysis re Full Case Loader (Ex. 72 to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
73	GMSI Job Task Analysis re Heavy Selector (Ex. 73 to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

74	GMSI Job Task Analysis re Light Selector (Ex. 74 to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
75	GMSI Job Task Analysis re Team Lead (Ex. 75 to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

ATTACHMENT C

EEOC Form 136
(10/94)

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

SUBPOENA

TO: Grady Rosier, President/CEO NO: PHX-11-33
McLane Company
4747 McLane Parkway
Temple, TX 76504

IN THE MATTER OF: EEOC v. McLane Company

Charge No. 540-2010-01761

Having failed to comply with previous request(s) made by or on behalf of the undersigned Commission official,

YOU ARE HEREBY REQUIRED AND DIRECTED TO:

☐ Testify before: ☐ Produce and bring * or
☒ Mail * the documents described below to:

☐ Produce access to the evidence described below for the purpose of examination or copying to:

Investigator Barbara Rusden of the Equal Employment Opportunity Commission

at 3300 N. Central Ave., Ste. 690, Phoenix, AZ 85012 on March 9, 2011 at 4:00 p.m. o'clock

The evidence required is

See Attachments A and B which are incorporated herein by reference.

cc: Bobby Carlson, McLane Sunwest
Ronald E. Manthey, Morgan Lewis

This subpoena is issued pursuant ☐ (Title VII) 42 U.S.C. 2000e-9 ☒ (ADEA) 29 U.S.C. 626(a) ☐ (EPA) 29 U.S.C. 209 ☐ (ADA) 42 U.S.C. 12117(a)

ISSUING OFFICIAL
(Typed name, title and address) ON BEHALF OF THE COMMISSION

[SEAL]

Rayford O. Irvin,
District Director
330 N. Central Ave.,
Ste. 690
Phoenix, AZ 85012 /s/ Rayford O. Irvin 11 FEB 2011
Date

*NOTICE TO PERSON SUBPOENAED—The Commission will not pay witness fees or travel expenses for the delivery of required documents to a Commission office unless the box "Testify before" is also checked on the subpoena.

[Subpoena Proof Of Service Omitted]

ATTACHMENT A TO PHX-11-33

If Respondent withholds any evidence or document in responding to this subpoena, Respondent is instructed to provide a detailed description of the evidence or document withheld and the specific basis upon which it is being withheld,

"Evidence" shall mean any information whether presently compiled in documentary form or capable of being compiled and which exists in any form, including but not limited to that information which may exist in the minds of supervisors or workers. See Equal Employment Opportunity Commission v. Maryland Cup Corp., 785 F.2d 471 (4th Cir. 1986)

"Documents" or "Documentary Form" shall mean and include all written, printed, typed, graphic material, computer files or other tangible mediums of reproduction or communication, of every kind and description, however produced or reproduced, by whomever prepared, to whomever addressed, which are in possession, custody, or control of the person or entity to which

this Subpoena is directed or to which such person or entity has, has had, or can obtain access. Further, the term "documents" includes any copies or documents which are not identical duplicates of the originals, including, but not limited to, all drafts of whatever date, copies with typed or handwritten notations, and copies of documents the originals of which are not in the possession, custody, or control of the person or entity to which the Subpoena is directed.

Date 11 FEB 2011 /s/ Rayford O. Irvin

Rayford O. Irvin, District Director
Equal Employment
Opportunity Commission
330 N. Central Avenue, Suite 690
Phoenix, AZ 85012

ATTACHMENT B TO PHX-11-33

Respondent: McLane Company, Inc. (all facilities/ locations nationwide including corporate)

1. Documents which reflect the name, title, address and telephone number of the person to whom further inquiries should be directed.

2. Documents which reflect the correct legal name and business address of the Respondent and describe the nature of Respondent's business. Include any and all trade names, d/b/a's, or former names. Also include documentation either already

in existence or prepared by Respondent in response to this request that describes or provides the following information:

a. the type of corporate or business entity

b. approximate number of employees during each calendar year during the relevant time period

c. location of corporate headquarters

d. current status of the corporation, i.e. active, inactive, or another status

e. the name of Respondent's corporate officers, directors, and owners

f. the statutory agent for Respondent in Arizona

g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

   i. Provide the legal name and business address of all superior and subordinate business entities identified.

   ii. Provide the statutory agent for all superior and subordinate business entities identified.

3. Documents which reflect liability insurance that will provide coverage for this charge.

4. Submit copies of any and all employee handbooks in effect from January 1, 2006 to the present and

a. provide documents which reflect in detail how this information is disseminated to employees, and

b. provide documents which reflect the date when any employee handbook went into effect, and the dates of any revisions.

5. Documents which reflect or a list identifying each test used by Respondent from January 1, 2006 to the present, including but not limited to Industrial Physical Capability Strength test (IPCS) and Isokinetic Physical Capability Test (IPCT), and provide documents which reflect any variations of each test in use.

a. For each test variation, provide documents which reflect or a list which identifies all jobs or job classifications for which it has been used.

b. List all alternative names used to describe or refer to each test and variation.

6. For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #5 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:

a. provide documents which reflect how the test was developed and how it is used by Respondent,

b. provide documents which reflect the name of each tests or variation's author or creator; the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

c. provide documents which describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the process. Include copies of all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include copies of any and all documents reviewed by any key decision makers in addition to paragraph 7 below,

d. provide documents which reflect the effective dates of use of each test or variation at each of Respondent's locations,

e. provide documents which reflect any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for individual(s) who administer the test and individual(s) who take the test,

f. provide documents which reflect a description of how each test or variation is administered and scored. Include documents which reflect a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

g. provide documents which reflect or a list of all jobs and job classifications for which any test or variation is used;

h. for each job or job classification for which a test or variation is used, provide documents which identify the specific test or variation (listed in response to paragraph 5) used for that job or job classification,

i. for each job or job classification for which a test or variation is used, provide documents which identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide documents which reflect the details on the process by which any scoring/classification system was established, and provide documents which reflect the details about the process by which Respondent determined the minimum score considered "passing."

j. for each job or job classification for which a test or variation is used, provide copies of the job descriptions.

k. provide copies of any and all adverse impact studies performed for each test or variation.

7. Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #5 and #6 above, to include any notes or other documents concerning development and implementation of the test by Respondent.

8. For all positions at Respondent's facilities/locations nationwide for which any test or variation identified in #5 and #6 above is used, provide a

copy of the Job Task Analysis for each position. Include:

a. documents which reflect or a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and

b. any documents containing job analysis information for all positions wherein testing is applied to employees and/or new hires.

9. For January 1, 2006 to the present date, provide documents or a listing* of information identifying all persons who took any test or variation identified in #5 and #6 in connection with employment at any of Respondent's locations or facilities nationwide. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

e date of application

f date of hire (or promotion), and job classification at hire (or promotion)

g test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

h. position held at the time test was administered (for individuals employed at the time or returning to work)

i position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

j reason why test was administered to each person tested

k. date and reason for termination (if applicable)

l. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

10 Provide documents which reflect or a list of all Respondent's facilities and locations in existence from January 1, 2006 to the present.

11. For all Respondent facilities/locations nationwide from January 1, 2006 to the present and with respect to any test or variation identified in #5 and #6 above, provide documents or a list* of information identifying all persons by name, last known home address and telephone number, and social security number, who were:

a. terminated because of an inability to pass any test or variation,

b. reassigned and/or transferred because of an inability to pass any test or variation,

c. not hired because of an inability to pass any test or variation,

d. not promoted because of an inability to pass any test or variation,

12. For each person identified in 11(a) through 11(d), provide documents which reflect:

a. date of termination, reassignment, transfer, not hired or not promoted,

b.. name and title of the individual who made the decision to terminate, reassign, transfer, not hire and/or not promote the person based on test results.

13. For each test or variation identified in #5 or #6, provide any and all documents evidencing any change, whether a reduction or increase, in workplace injuries.

14. From January 1, 2006 to the present, if Respondent received any formal or informal complaints by any employee concerning the test(s), or any claims of discrimination based on age, submit documents evidencing the following:

a. name and job title of each person who complained,

b. name and job title of each person receiving each complaint,

c. date of each complaint,

d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken,

15. Provide documents or a list* of all individuals who applied for a position, for which the test identified in #5 and #6 above was in use, at any location or facility of Respondent from January 1, 2006 to the present. Include:

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. date of application

f. whether the applicant was hired, and date and reason for hire or non-hire

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

g location at which they applied and

h position for which they applied.

16. Provide documents or a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #5 and #6 above was in use, at any and location or facility of Respondent from January 1, 2006 to the present. Include:

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. date promotion sought

f. whether the individual seeking promotion was selected, and, if so, date and reason for selection or non-selection

g. location at which they sought promotion and

h. position for which they sought promotion.

17. Provide documents or a list* of all individuals who were employed by Respondent at any location or

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* The data should be provided on compact disk. It may be written in one of the following formats; Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

facility nationwide from January 1, 2006 to the present. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. date of hire

f. all position titles held

g. dates when each position title was held

h. termination date and reason, if applicable.

18. List any and all alternatives to the ICPS [sic] or IPCT test that Respondent considered implementing in lieu of the ICPS [sic] or IPCT test. Include:

a. copies of all documents Respondent reviewed in considering any such alternatives.

b. copies of all documents relating to any findings, analyses, or determinations made by Respondent regarding any such alternatives.

[Doc. 2-1]

EXHIBIT 14

BEFORE THE UNITED STATES
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

IN THE MATTER OF

Damiana Ochoa,

Charging Party,

v.

McLane Sunwest

Respondents and Petitioners,

CHARGE NO.
540-2008-01093

SUBPOENA NO.
PHX-11-32

PETITIONERS' ATTORNEYS

Ashley T. Kasarjian
Joshua R. Woodard
Snell & Wilmer LLP
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004

FINAL DETERMINATION ON PETITION TO REVOKE OR MODIFY SUBPOENAS

Pursuant to its Procedural Regulations, 29 C.F.R. § 1601.16(b) and Section 24.12 of the EEOC Compliance Manual, the Equal Employment Opportunity Commission ("EEOC" or "Commission") issues this Final Determination.

I. BACKGROUND

A. Brief History of Charge

In January 2008, Charging Party Damiana Ochoa filed a charge alleging that Respondent McLane Sunwest violated Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, by discriminating against her on the basis of sex and pregnancy. Ms. Ochoa asserted that because she took a pregnancy leave, Respondent would not allow her to return to work unless she passed a physical capability strength test referred to as the "Industrial Physical Capability Strength Test" or "IPCS." Because she failed to pass the "IPCS" test, she was terminated from her position as a cigarette selector—a position she had previously held for over eight years. Ms. Ochoa further asserted that Respondent violated the Americans with Disabilities Act by not allowing employees who took medical leave to return to work unless they passed the IPCS test and by requiring all new hires to pass the test. *See* Exhibit 1, Charge of Discrimination filed by Damiana Ochoa. During the EEOC's investigation of Ms. Ochoa's Charge, information was discovered regarding the company-wide use of the IPCS test in McLane's Grocery and Food Services divisions. On August 6, 2010, the Director of the Phoenix District Office directed that a nationwide investigation be conducted of McLane Company pursuant to the Age Discrimination in Employment Act of 1967. On September 6, 2010, the EEOC received another Charge of Discrimination against McLane Company, which was filed with both the EEOC and the California Department of Fair

Employment and Housing. The Charging Party alleged that McLane Company discriminated against him on the basis of his disability by requiring him to take an isokinetic test and not allowing him to return to work.

On November 9, 2010, the EEOC advised Respondent that it was broadening the scope of its investigation of Ms. Ochoa's Charge to all McLane facilities nation-wide. Subsequently, on August 9, 2011, the EEOC received yet another charge of discrimination against McLane. The Charging Party alleged that McLane discriminated against her on the basis of her gender, disability, and her age by terminating her employment because she was unable to pass a physical test after a leave of absence.

B. Evidence Requested in the Subpoena

As part of the investigation of Ms. Ochoa's Charge, the EEOC Investigator sought documents relevant to allegations that Respondent's policies and practices regarding physical strength tests resulted in discrimination on the basis of sex, pregnancy, and disability. On February 15, 2011, after issuing Requests for Information, the EEOC issued administrative subpoena No. PHX-11-32. *See* Exhibit 2. The EEOC and Respondent have met and conferred in an effort to resolve disagreements regarding the subpoena. The categories of documents upon which agreement could not be reached and which are the subject of this determination, generally fall into two categories: (1) lists of employees and applicants who were terminated, demoted, or not hired

because they failed to pass the IPCS test, including names, last known addresses, phone numbers, and social security numbers for those employees and applicants (Request Nos. 10, 11a., 14, 15); (2) data regarding employees and applicants who took the test, including:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

g. date of hire (or promotion), and job classification at hire (or promotion)

h. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

i. position held at the time test was administered (for individuals employed at the time or returning to work)

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

(Request Nos. 8a-l). Although Respondent has provided nationwide data regarding the gender and test passage of the employees who took the test in the grocery division, it has failed to provide the names, social security numbers, addresses and phone number of employees and applicants and has also failed to provide information regarding medical condition, date of application, date of hire and job classification at hire, test score and sub-test scores, reason for termination, and position held at the time the test was administered.

C. Respondent's Objections to the Subpoenas

Under the administrative provisions of 29 C.F.R. § 1601.16(b)(1), Respondent has moved to revoke or modify Subpoena No. PHX-11-32. *See* Exhibit 3. First, Respondent objects that a subpoena issued in the investigation of the EEOC's ADEA Charge is nearly identical to the subpoena at issue here, which is sought as part of an investigation of Ms. Ochoa's Charge. Second, Respondent objects that the EEOC seeks information that would require data compilation, and is irrelevant, overbroad, unduly burdensome, confidential, an abuse of process and issued solely to harass Respondent. In particular, Respondent raises this second category of objections in response to the EEOC's requests for employee lists with the names, last known addresses, phone numbers, and social security numbers of employees. Each of these objections will be addressed in turn, below.

II. ANALYSIS

The EEOC is specifically authorized by statute to conduct investigations to determine if employment discrimination is being committed or has occurred. 42 U.S.C. § 2000e-5 and 42 U.S.C. §2000e-8(a). Title VII grants the EEOC broad investigatory powers, providing that the Commission "shall . . . have access to . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation." 42 U.S.C. §2000e-8(a). The Ninth Circuit has explained the necessity for a broad scope of EEOC investigations, stating:

> [T]he EEOC must be permitted to investigate the full picture of Recruit's and Interplace's recruitment and internal hiring practices. We therefore decline the companies' invitation to straitjacket the EEOC into an artificially narrow survey of [information]. Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation.

EEOC v. Recruit U.S.A. Inc., 939 F.2d 746, 756-57 (9th Cir. 1991) (citations omitted).

A. The Information Sought Is Within the EEOC's Investigative Authority

Respondent objects that the subpoena issued in the EEOC's investigation of Ms. Ochoa's Charge subpoena is nearly identical to the subpoena issued under

the EEOC's ADEA Directed Charge. However, the central issue is not whether overlapping information is requested in the subpoenas, but rather whether the information sought under the Ochoa Charge is within the scope of the EEOC's investigative authority.

While the EEOC's investigative authority is not unlimited, the information sought must only be "relevant to the charge under investigation." Section 709(a), 42 U.S.C. §2000e-8(a). The relevance requirement is "generously" construed, "afford[ing] the Commission access to virtually *any* material that *might* cast light on the allegations against the employer." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984) (emphasis added). *also EEOC v. Federal Express Corp.*, 558 F.3d 842, 854 (9th Cir. 2009) ("Relevancy is determined in terms of the investigation rather than in terms of evidentiary relevance"); *EEOC v. Cambridge Tile Mfg. Co.*, 590 F.2d 205, 206 (6th Cir. 1979) (per curiam) (EEOC may subpoena documents "concerning any employment practice which may shed light on the discrimination charged"); *accord EEOC v. Franklin & Marshall Coll.*, 775 F.2d 110, 115-115 (3d Cir. 1985), *cert. denied*, 475 U.S. 1163 (1986).

Here, the information sought in the subpoenas issued under the Ochoa Charge and the ADEA Charge are not identical because they seek information relating to different protected categories; however, both subpoenas seek overlapping information relating to Respondent's testing policies and practices. The Ochoa Charge specifically alleges that Respondent's testing

practices are discriminatory, therefore, information regarding the implementation of testing policies and practices falls well within the EEOC's authority to investigate the Ochoa Charge.[1] Regardless of whether overlapping information is sought under the ADEA Directed Charge, the EEOC has broad authority to seek information regarding McLane's testing practices under the Ochoa charge.

B. The Subpoena Is Not Unduly Burdensome or an Abuse of Process

Respondent objects that the EEOC seeks information that would require data compilation that is unduly burdensome, irrelevant, overbroad, confidential, an abuse of process and issued solely to harass Respondent. First, with respect to Respondent's objections that data compilation is unduly burdensome, the Commission has the right to subpoena "[t]he production of evidence, including but not limited to, books,

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[1] Investigation of McLane's testing practices also fall within the scope of the ADEA Directed Charge. Respondent erroneously refers to the ADEA Directed Charge as a "Commissioner's Charge," and asserts that the EEOC failed to explain why it is justified. However, the ADEA gives the EEOC authority to investigate and enforce independent of individual employee charges. *EEOC v. American & Efird Mills, Inc.*, 964 F.2d 300,304 (4th Cir.1992); *see* 29 C.F.R. §§ 1626.4, 1626.13. In fact, the Supreme Court has acknowledged the EEOC's autonomous investigative and enforcement authority under the ADEA, declaring that the agency may receive information concerning alleged violations of the ADEA from any source. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1994).

records, correspondence, or documents." 1 *EEOC Compliance Manuel* [sic] § 24.4(a) (5/92); *see also* 29 C.F.R. § 1601.16(a)(2). Courts have held that "EEOC may compel an employer to compile information within its control in order to respond to a subpoena, and the subpoena power of the EEOC is not limited to production of documents already in existence." *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1039 (10th Cir. 1993); *Maryland Cup Corp.*, 785 F.2d, at 478; *see also Shell Oil Co.*, 466 U.S., at 68-69. Indeed, the Ninth Circuit required an employer to respond to requests requiring compilation of information regarding computer databases. *EEOC v. Fed. Ex. Corp.*, 558 F.3d 842, 854-56 (9th Cir. 2009) (FedEx required to respond to subpoena and identify computerized databases in which it maintains employee information), adopting the analysis in *EEOC v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 114 (4th Cir. 1997).

Second, Respondent's relevance and overbreadth objections are based on its assertion that the EEOC is not entitled to nationwide data. However, the Ninth Circuit held in *EEOC v. Federal Express*, that when an individual charge of discrimination "raises the specter of systemic discrimination, the EEOC has the authority to investigate charges of discrimination beyond the alleged individual discrimination specifically committed against [the individual charging party]." *E.E.O.C. v. Federal Exp. Corp.*, 558 F.3d 842, 855 (9th Cir. 2009). The Ninth Circuit further held that courts should enforce a subpoena seeking company-wide data even when it is based on an individual charge because the

EEOC "plainly has jurisdiction to seek company-wide data." *Id; see also, E.E.O.C. v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1039 (10th Cir. 1993), *citing EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir. 1975), cert. denied, 423 U.S. 994 (1975) (upholding EEOC's subpoena for information outside the scope of the specific charge, recognizing EEOC seeks to "vindicate the public interest, which is broader than the interest of the charging parties").

Here, McLane implements the Industrial Physical Capability Strength test nation-wide. Because the test is alleged to be discriminatory and it is used by McLane nationwide, it raises the specter of systemic discrimination. *Federal Exp.*, 558 F.3d at 855. Additionally, the Commission has already notified McLane that it is broadening the scope of its investigation of Ms. Ochoa's Charge to all McLane facilities nation-wide. Therefore, the enforcement of a subpoena for company-wide data is warranted in this case.

Third, with regard to Respondent's concern about the confidentiality of the information, the plain statutory language of Title VII requires the EEOC not to disclose information obtained during an investigation. 42 U.S.C. § 2000e-8(e) states:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any

> officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

Accordingly, during the investigative stage, the Commission is bound by law to protect any privacy right Respondent and its employees may have in the requested information. Failure to do so subjects EEOC employees to fines and possibly imprisonment. To abide by this law, the EEOC takes extensive measures to safeguard confidentiality. For example, the Commission redacts social security numbers and dates of birth when responding to Freedom of Information Act Requests. Therefore, Respondent's concern is adequately addressed by the penalties provided under Title VII.

Fourth, Respondent asserts that the EEOC is engaged in a fishing expedition that constitutes an abuse of process. As set forth above in Section II(A), the central issue is whether the information sought is relevant to the Charge under investigation. The Ninth Circuit has ruled that the scope of information considered relevant under this standard is "quite broad." *EEOC v. Recruit U.S.A. Inc.*, 939 F.2d 746, 756 (9th Cir. 1991). Moreover, the EEOC's assessment of relevance is entitled to deference so long as it is not "'obviously wrong.'" *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110,

113 (4th Cir. 1997) (quoting *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992)). The Tenth Circuit has additionally clarified:

> Although the Supreme Court has advised that the relevance standard must not be interpreted so broadly as to render the statutory language a "nullity," we have explained (1) that an EEOC administrative subpoena "is enforceable even though no 'probable cause' has been shown," (2) that even some requests we "previously considered to be administrative '*fishing expeditions*' are often permitted," and (3) that such subpoenas "may be enforced for investigative purposes unless they are plainly incompetent or irrelevant to any lawful purpose."

EEOC v. Dillon Companies, 310 F.3d 1271, 1274-75 (10th Cir. 2002) (citations omitted) (emphasis added).

Fifth, Respondent provides no explanation or evidence for its allegations that the subpoena is issued solely to harass Respondent. Ms. Ochoa's Charge challenges a nationwide policy, pattern, or practice which effectively prohibits employment of individuals who, like Ms. Ochoa, failed a physical strength test. Ms. Ochoa had worked as an employee for eight years before the test effectively foreclosed her ability to return to work. Given the gravity of the consequences of failing such tests, and Respondent's nationwide use of the tests, the Commission's investigation is both warranted and justified.

1. The Commission is Entitled To Obtain Employee and Applicant Lists

Based on the objections set forth in section I(C), Respondent has refused to provide the names, last known addresses, phone numbers, and social security numbers of employees and applicants, including employees who were terminated or demoted because they failed to pass the IPCS test. The employee and applicant lists are relevant to identifying witnesses, comparative parties, and/or individuals who may have been subjected to disparate impact or treatment by Respondent. Additionally, because the Commission is investigating whether Respondent violated the ADA, employee and applicant lists are undeniably relevant to identifying individuals with disabilities who failed to pass the IPCS test and conducting data analysis regarding the test performance of those individuals. Employee and applicant lists are well within the scope of information which "might cast light" upon the EEOC's investigation of whether Respondent's testing practices are discriminatory. *See Shell Oil Co.*, 466 U.S. at 68-69. Although Respondent asserts that it would have to engage in data compilation, as set forth above, the "EEOC may compel an employer to compile information within its control." *Citicorp Diners Club, Inc.*, 985 F.2d at 1039. Additionally, Respondent has already provided data regarding employees but has designated an employee number for employees rather than disclosing their names. The additional effort required to designate employee numbers undermines Respondent's argument that it cannot identify employees.

Respondent additionally objects that an employee list would require disclosure of confidential information. However, as set forth above, "confidentiality is no excuse for noncompliance since Title VII imposes criminal penalties for EEOC personnel who publicize information obtained in the course of investigating charges of employment discrimination." *Equal Employment Opportunity Commission v. Bay Shipbuilding Corp.*, 668 F.2d 304, 312 (7th Cir. 1981) (citing 42 U.S.C. ss [sic] 2000e-5(b), 2000e-8(e)) *see also, Equal Employment Opportunity Commission v. Associated Dry Goods Corp.*, 449 U.S. 590, 604 (1981) (Respondent does not have categorical right to refuse to comply with the EEOC subpoena based on concerns that the information supplied would not be held in absolute secrecy.). Similarly, the United States Supreme Court has rejected the notion that a showing of more than relevance is required as a condition of obtaining confidential materials in the peer review setting. *EEOC v. University of Penn.*, 493 U.S. 182 (1990). Therefore, the need for confidentiality is not a valid basis to refuse to comply with an EEOC subpoena. *See University of Penn.*, 493 U.S. at 192; *Associated Dry Goods Corp.*, 449 U.S. at 603.

III. CONCLUSION

For the reasons set forth above, Respondent's Petition fails to raise objections sufficient to revoke or modify the subpoena. The information sought is within the EEOC's broad investigatory powers.

IV. DETERMINATION

Based upon the foregoing, it is determined the Petition to Revoke or Modify Subpoena No. PHX-11-32 is denied. Within twenty (20) days of the receipt of this Determination, Respondent is directed to provide the Commission with the information and tangible things requested.

On behalf of the Commission,

/s/ Bernadette B. Wilson — March 21, 2012

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

Date

[Doc. 2-1]

EXHIBIT 15

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
400 East Van Buren Street
Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000
602.382.6070 (Fax)
www.swlaw.com

Ashley T. Kasarjian
602-382-6544
akasarjian@swlaw.com

DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
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PHOENIX
SALT LAKE CITY
TUCSON

May 10, 2012

VIA EMAIL AND U.S. MAIL

Barbara Rusden, Investigator
Equal Employment Opportunity Commission
Phoenix District Office
3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012

Re: *Charge No.:* *548-2008-01093*
Charging Party: *Damiana Ochoa*
Respondent: *McLane Sunwest, Inc.*

Dear Ms. Rusden:

This letter is in follow up to your requests for information from McLane/Suneast, Inc. (d/b/a "McLane Sunwest"). As you know, some of the data that the EEOC requested McLane Sunwest to produce had to be collected from third-party sources. When McLane Sunwest originally collected the data from Industrial Physical Capability Services, Inc. ("IPCS"), certain duplicate entries were eliminated to make the data more user-friendly for conducting disparate impact analysis. For example, duplicate entries for the same person taking the IPCS PCE multiple times for the same reason artificially inflate the "does not meet requirement" rates.

As we have continued to analyze the data, we have discovered errors in the de-duplication. As such, we have requested new data from IPCS with no de-duplication. We wanted to promptly inform you of the issue as it may impact your analysis as well. We are working

diligently to provide updated IPCS data to the EEOC shortly.

If you have any questions, please let us know.

Sincerely,

SNELL & WILMER L.L.P.

/s/ Ashley Kasarjian
Ashley Kasarjian

ATK:kh

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